Published by the Environmental Law Section of the Virginia State Bar for its members

Environmental Law News

Volume XI, No. 1 **Winter 2001**

Virginia Statutes of Limitation in Environmental Actions

by Michael C. Davis, Esquire, Willcox & Savage, P.C.

Environmental litigation raises unique and complex issues involving the application of statutes of limitation. This is so for two basic reasons. First, environmental contamination is often not detected when it initially occurs. For example, hazardous substances may be released and seep, undetected, onto neighboring property over a period spanning many years. Second, the impacts of contamination may be difficult to detect until many years later. For example, diseases manifesting themselves now may have been caused by exposure to chemicals years ago; due to long latency periods, it may be decades before a plaintiff discovers, or reasonably should discover, any symptoms of her injuries. These two factors combine to create the possibility that damages as a result of environmental contamination will occur but remain undiscovered until well after the initial spill or other release.

In Virginia, if a plaintiff's cause of action is not discovered until after the initial spill or release, the defendant may argue the cause of action is time barred pursuant to the statute of limitations. This is so because Virginia's General Assembly, and its

continued on page 2

Chair's Corner

This is another very active year for the Environmental Law Section, with many educational events and opportunities for your participation in Section activities. We have already co-sponsored an outstanding, CLE-accredited seminar on environmental liability. The next major event is the publication of an issue of the *Virginia Lawyer* magazine, in April, that will be focused on the Section. This is an excellent opportunity for our Section to show the diversity and vitality of our field to all of the lawyers in Virginia. As of this date, we have commitments for the production of an adequate number and range of articles. However, if you are interested in submitting an article for the magazine, please do so quickly. The requirements for articles are as follows:

- 3,500 words each (14 typed pages each, double-spaced)
- photo of author, print preferred (not e-mail file)
- short bio of author requested with article copy
- endnotes (not footnotes)
- hard copy and e-mail of the draft version sent as soon as possible to the Section, care of Dolly Shaffner at shaffner@vsb.org, and
- final version sent by February 23, in Word or WordPerfect format to Rod Coggin at coggin@vsb.org.

Please do not hesitate to submit an article for publication. Those articles that cannot be incorporated into the magazine may be offered publication in a future edition of this newsletter.

If you attended the environmental liability seminar that the Section co-sponsored, then you already know that the Section is soliciting members' views on possible themes for the biennial Science and Law Seminar that will be held this April. Past seminars have provided a general survey of scientific information used in environmental law. This year, we're looking for ways to tailor this presentation to the most current issues in litigation and regulation. Please send any suggestions to Leonard Vance at vance@gems.vcu.edu.

Finally, for our Annual Meeting presentation, we plan to co-sponsor a seminar on environmental liability with the Local Government Section. Expect more on that in the next edition of this newsletter. I look forward to seeing you at any of these upcoming events, or seeing you in print.

Edward A. Boling

Environmental Law News
Volume XI, No. 1

Prepared by the staff of
Environmental Law Digest

Washington & Lee University
School of Law
Lewis Hall, Room 220A
Lexington, Virginia 24450-0303

continued from page 1

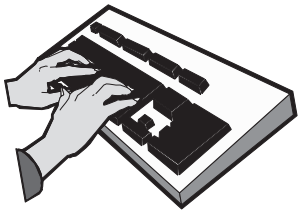
courts, have consistently refused to adopt a so-called "discovery" rule generally applicable to environmental actions. Such a discovery rule, which has been adopted in many states other than Virginia, typically provides that causes of action do not accrue until the plaintiff knew, or should have known, of her injuries.

While Virginia has been reluctant to adopt such a discovery rule, federal law has, in many respects, superimposed a discovery rule for many environmental actions since 1986. The federal discovery rule applies to actions alleging violations of Virginia's common law even if those actions are pending in Virginia's state courts. Additionally, as a result of emerging theories under state law involving the concept of "intermittent" wrongs, Virginia courts have moved much closer to adopting a *de facto* discovery rule in the environmental context for certain types of actions.

In order to understand how the application of statutes of limitation work in the environmental context, and the interplay between state and federal law, this article addresses these topics in three sections. The first section addresses Virginia's statutes of limitation generally applicable to the causes of action commonly asserted in environmental litigation such as trespass, nuisance, and negligence. It explains the accrual of environmental causes of action and explores how Virginia courts have, in some instances, softened the oftentimes harsh accrual rules by distinguishing between being exposed to contaminants and being injured by them. The second section addresses federal statutory law which has modified Virginia's statutes of limitation otherwise applicable to many environmental causes of action. This section explains that, for many environ-

continued on page 3

Articles of General Interest



The articles in this section are intended to provide analysis and discussion of topics that may interest environmental law attorneys. The *Environmental Law Digest* welcomes submissions and suggestions of articles and topics for future issues. Please send your articles or suggestions to the following address:

Environmental Law Digest
Room 520, Lewis Hall
Washington & Lee Law School
Lexington, Virginia 24450
540/462-4750

Table of Contents

continued from page 2

mental actions alleging property damage or personal injuries, federal law replaces Virginia's accrual rule with one that is more plaintiff-friendly. The third section will address the theory of "intermittent" wrongs which has been asserted in environmental litigation in an attempt to ameliorate the effects of Virginia's strict statutes of limitation.

Virginia's Statutes of Limitation

Statutes of limitation are designed to ensure that prospective plaintiffs assert their claims in a timely manner.[1] Given this purpose, one might suppose that statutes of limitation would start to run after the plaintiff knew, or should have known, of her injuries. However, under Virginia law, this is not typically the case.

Consider the following two types of actions. In actions seeking compensation due to environmental damage to real estate, which typically sound in trespass and nuisance, the applicable statute of limitations in Virginia is five years after the cause of action accrues.[2] In actions seeking damages for personal injury due to exposure to toxins, which typically are based on allegations of trespass, nuisance, or negligence, the applicable statute of limitation is two years after the cause of action accrues.[3] Thus, for both property damage and personal injury actions alleging injuries due to environmental contamination, the date the cause of action accrues is vitally important. In both cases, the applicable statute of limitation commences to run when the damage to person or breach of duty occurs and not when the damage is, or should be, discovered. This is due to *Va. Code* § 8.01-230, which provides:

> In every action for which a limitation period is prescribed, the cause of action shall be deemed to accrue and the prescribed limitation period shall begin to run from the date the injury is sustained in the case of injury to the person, when the breach of contract or duty occurs in the case of damage to property and not when the resulting damage is discovered, except where the relief sought is solely equitable or where otherwise provided under § 8.01-233, subsection C of § 8.01-245, §§ 8.01-249, 8.01-250 or other statute.[4]

Obviously, in the environmental context there may be a wide discrepancy between the date the injury or breach first occurs and the date when the injury is first discovered and suit is brought. Such a discrepancy is made more likely by the rule that once an injury is sustained, no matter how slight, the right of action for injury accrues and the statute of limitation begins to run.[5] Under the "slight injury" rationale, it is immaterial that all the damages resulting from the wrong may not have been sustained at the time of the initial negligent act which caused some injury. Indeed, the running of the statute of limitations is not postponed by the fact that substantial damages do not occur until a date substantially after the initial injury.[6]

As a result of Virginia's traditional statutes of limitation, totally unknown environmental claims may be barred even if they are asserted immediately after a plaintiff learns, or in the exercise of due diligence should learn, of her claims. While not an environmental case, *Granahan v. Pearson*,[7] provides an example of how this may occur. In *Granahan*, the plaintiff sued her doctor claiming that she became sterile due to her doctor's negligent failure to remove an intrauterine device. The court held that the plaintiff's claim was time barred despite the fact that the plaintiff filed suit within two years of first learning of her sterility. The court reasoned that because the doctor's treatment of the plaintiff, including his failure to remove the devise, ended in 1979, more than two years before suit was brought, the statute of limitations had expired. The court held that while it was "unfortunate" that the plaintiff did not discover her infertility until after the Virginia statute of limitations barred her claim, it had no discretion in the matter.[8]

Similarly, in *Irvin v. Burton*,[9] the plaintiff was sterilized by the defendant physician in 1980 but, due to a mistake made by the physician during the sterilization procedure, she became pregnant in the summer of 1984 and delivered a child in 1985. The plaintiff sued in 1985, but the court held that this claim was not timely because the actionable conduct and the harm occurred five years earlier. Notably, Judge Turk, the author of the *Irvin* decision, commented in a footnote that this result, while mandated by Virginia law, was "absurd."[10]

Perhaps because of the questionable public policy inherent in barring unknown causes of action, Virginia courts have on certain occasions attempted to modify the harsh application of statutes of limitation by holding that exposure and injury may be distinct in time. By separating exposure and injury, courts have been able to permit environmental claims to proceed even if the last exposure to the environmental hazard occurred many years before suit was filed.

For example, in *Locke v. Johns-Manville Corp.*,[11] the plaintiff filed suit in 1978 alleging he contracted cancer as a result of inhaling asbestos fibers from approximately 1948 to 1972.[12] Because the litigation was filed approximately six years after the plaintiff's last exposure to asbestos, the cause of action would be time barred if it commenced to run from the date of the plaintiff's last exposure. However,

the plaintiff attempted to avoid this result by arguing that his injury did not occur until well after his last exposure to asbestos. That is, while the plaintiff inhaled asbestos fibers from 1948 to 1972, he argued that these fibers, which remained trapped in his body, did not begin to harm him, even slightly, until well after 1972. The plaintiff offered evidence that, prior to November of 1977, a year before he filed suit, he was in excellent health and had absolutely no physical symptoms of lung disease or cancer. Based on these facts, the court held the plaintiff's claims were not time barred.

The court reached this result by distinguishing between the time of exposure to asbestos and the time when that exposure first caused injury to the plaintiff. The court held that the running of the statute of limitations commences when the harm occurs, which may be substantially after the last date of exposure.[13] The court held that because the cancer did not arise when the asbestos dust was inhaled and became trapped in the plaintiff's body, the statute of limitations did not begin to accrue until the cancer was present.

The distinction used in *Locke* may be helpful to plaintiffs asserting environmental actions if they are able to prove that the disease, and not just noticeable symptoms of the disease, occurred more recently than exposure to the harmful materials. If the plaintiff can make such a showing, her claims should not accrue until the disease first manifested itself in some manner so as to be capable of physical detection.

However, as a practical matter, it may be difficult for many plaintiffs to use *Locke* to their advantage. Proving that the disease did not manifest itself, in any form, until years after the exposure commenced may not always be possible. Moreover, this type of analysis ultimately depends on how courts define "injury." For example, cells, or DNA in cells, may mutate at the time of exposure to certain hazardous chemicals. However, these cells may not become cancerous until years later. In this case, the courts would need to decide whether the mutation or the growth of the cancer itself constituted the actionable "injury." These sorts of issues seem to have little to do with the traditional purposes served by statutes of limitation.

Additionally, *Locke* may have less application to property damage actions. In actions alleging property damage, courts may have a more difficult time distinguishing between exposure and injury. Defendants will surely argue that even the slightest contamination of property by hazardous chemicals constitutes a technical trespass and is therefore sufficient to start the running of the statute of limitations. Defendants may also argue that any contamination, regardless of amount, constitutes an "injury" to property.

However, in a case asserting property damage as a result of contamination, the theories utilized in *Locke* have been employed by a plaintiff with success. In *McKinney v. Trustees of Emory and Henry College*,[14] the plaintiff sued the defendant claiming that a stream on the plaintiff's land was contaminated by sewage originating on the defendant's upstream property. The defendant claimed the action was barred by the statute of limitations because the defendant began directing sewage into the stream more than five years prior to the filing of the suit. The plaintiff countered that the sewage placed into the stream more than five years ago was negligible and inflicted no injury on the plaintiff at that time.

The Virginia Supreme Court held that the statute of limitations did not commence when the sewage was first directed into the stream because, at that time, the pollution was not inflicting any injury on the plaintiff. Instead, the court held that the "plaintiff's cause of action accrued when the discharge of sewage into Emery Creek was in *sufficient quantities* to pollute the stream and constitute a nuisance."[15] Thus, according to *McKinney*, it is only when the pollution is in such a quantity that it is great enough to cause injury that the statute commences to run.[16]

While offering important arguments to plaintiffs asserting environmental causes of action, the reasoning behind the *Locke* and *McKinney* decisions will at most suspend the accrual of the statute of limitation until the plaintiff is actually injured by the contamination. It is still possible, even if the *Locke* and *McKinney* theories of accrual are employed to their fullest extent, that a plaintiff will not learn of her injury, or the cause of her injury, until the statute of limitations has expired. However, since 1986, due to a change in federal law, the accrual date under Virginia law has been superseded, and a discovery rule has been imposed, for many types of environmental actions, including both personal injury and property damage claims. This issue is addressed immediately below.

CERCLA's Preemption of Virginia's Statutes of Limitation

Under certain circumstances, the Comprehensive Environmental Re-sponse, Compensation, and Liability Act ("CERCLA"), as amended,[17] supersedes the accrual dates otherwise mandated by state statutes of limitation. Instead of the accrual dates discussed above, which generally run from the date of the injury, CERCLA substitutes a discovery rule. CERCLA provides that the state law statutes of limitation for actions alleging damages caused or contributed to by a "hazardous substance" will commence

running when the plaintiff knew, or reasonably should have known, that the injury or damage was caused or contributed to by the hazardous substance. While this preemption is little known, it is explicit:

> In the case of any action brought under State law for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility, if the applicable limitations period for such action (as specified in the State statute of limitations or under common law) provides a commencement date which is earlier than the federally required commencement date, such period shall commence at the federally required commencement date in lieu of the date specified in such State statute.
>
> * * *
>
> [T]he term "federally required commencement date" means the date that plaintiff knew (or reasonably should have known) that the personal injury or property damages referred to in subsection (a)(1) of this section were caused or contributed to by the hazardous substance or pollutant or contaminant concerned.[18]

This preemption is extremely broad. As a preliminary matter, it clearly applies to actions "brought under State law." It also applies to actions "for personal injury, or property damages." Thus, it should apply to the common law causes of action typically asserted in environmental cases: trespass, nuisance, and negligence.

The only meaningful requirements for the federal commencement date to apply are that the injuries or damages must be (i) caused or contributed to by exposure to a "hazardous substance, or pollutant or contaminant," which is (ii) released into the "environment," (iii) from a "facility." These terms are all expansively defined by CERCLA.

CERCLA defines a "hazardous substance" to include most common industrial chemicals and metals.[19] There is, however, one significant exclusion. Petroleum products are typically excluded from the definition of hazardous substances and, therefore, contamination caused by most petroleum products is not covered by the federal accrual date. "Pollutant or contaminant" is similarly broadly defined and also excludes petroleum products.[20]

CERCLA defines "environment" to mean most surface water, ground water, drinking water, land surface or subsurface, or ambient air "within the United States."[21] Thus, a spill or discharge virtually anywhere in the country is subject to the federal commencement date.

With few exceptions, CERCLA defines a "facility" as virtually any location in any building, structure, installation, equipment, pipe, pipeline, well, pit, pond, lagoon, landfill, storage container, motor vehicle, rolling stock, aircraft, or any other site or area where a hazardous substance had been spilled, placed, disposed of, or located, but excludes "any consumer product in consumer use or any vessel."[22]

Thus, as the above definitions make clear, the federal commencement date under CERCLA would apply to most spills of chemicals anywhere in the United States unless the spill involved a petroleum product, such as gasoline, or unless the spill resulted from a consumer product in consumer use, such as a leaking battery in a portable radio.

Some courts have attempted to limit the scope of CERCLA's preemption in a manner not explicitly specified in CERCLA. For example, one federal district court held that CERCLA preempts state law only where there is an "underlying CERCLA action providing for cleanup and remedial activities."[23] However, other courts have rejected this limitation, which, these courts noted, is not contained in CERCLA.[24] While this issue is not yet definitively resolved, the better reasoned view, which is more consistent with CERCLA's statutory language and its purposes, is that no underlying CERCLA cleanup is required for the federally required commencement date to be applicable.

However, even if the federal commencement date applies, suit must still be brought within the applicable statutory period after the plaintiff knew or should have known that the personal injury or property damages were caused by the hazardous substance. Thus, in the example of a property damage case, if more than five years elapses after the plaintiff has or should have such knowledge, the suit will be barred. However, as discussed below, the theory of "intermittent" wrongs offers plaintiffs in appropriate cases an even longer statute of limitations than provided by CERCLA.

Permanent and Intermittent Wrongs

Virginia courts have held that, under certain circumstances, recovery of damages caused by contamination may not be time barred even if the litigation is commenced more than five years after the plaintiff first learned of the harm. The courts have reached this result by fragmenting the defendant's wrongful action into a series of wrongful actions. By segmenting the defendant's action into many discrete actions, the courts have reasoned that the contamination which occurred within the applicable number of years (five for damage to property or two for personal injuries) immediately prior to the filing of the plaintiff's litigation is

not time barred. Under this approach, while the plaintiff will not be able to recover for all of the harm caused by the contamination, she will be able to recover for all the damages which occurred within the applicable statutory period immediately preceding the filing of suit.

The leading Virginia case to take this approach is *Hampton Roads Sanitation District v. McDonnell*.[25] In this case, the Hampton Roads Sanitation District (the "District") operated a sewage pumping station adjacent to the plaintiff's property since 1969. During normal operations, the pump station operated without effecting the plaintiff's land. However, when wastewater flows were abnormally high, a relief valve would open allowing the excess flow to reach the plaintiff's property.

The District asserted that the plaintiff's cause of action was barred by the five year statute of limitations because the plaintiff failed to file suit within five years of the accrual of his cause of action. The District reasoned that the cause of action accrued in 1969 when the overflows from the pump station first began. The plaintiff did not deny that the overflows onto his property began in 1969. Instead, he argued that each overflow was a separate wrong giving rise to a separate cause of action. Thus, the plaintiff argued, he was entitled to recoup damages which occurred as a result of all overflows during the five years prior to filing suit.

The trial court agreed with the plaintiff that each overflow was a separate actionable event for which the plaintiff was entitled to seek recovery. The Virginia Supreme Court affirmed. Only claims as a result of discharges which occurred more than five years prior to filing suit were time barred. The Court explained that a distinction must be made between permanent actions and actions that occur in intervals. It noted that "if the wrongful act is of a permanent nature and one that produces all the damage which can ever result from it, then the entire damages must be recovered in one action and the statute of limitation begins to run from the date of the wrongful act." Thus, if the operation of the pumping station were deemed to be of a permanent nature, the plaintiff's claims would all be time barred. However, "when wrongful acts are not continuous but occur only at intervals each occurrence inflicts a new injury and gives rise to a new and separate cause of action." The Court ruled that, in this situation, "a plaintiff's right of recovery…is limited by the statute to the damages sustained during the five years immediately preceding the institution of the suit."

Based on the above analysis, the Court ruled that the overflows dating back to 1969 did not produce all the damage to the plaintiff's property that could ever result from the pumping station. Instead, when the pumping station became overloaded during periods of heavy rainfall, new overflows would occur. The Court held that the plaintiff had a separate cause of action after each overflow because each overflow was a new injury.

McDonnell is a promising case for plaintiffs in environmental actions. In cases where a defendant continues to release contaminants onto the plaintiff's property, *McDonnell* will permit recovery for the releases occurring within the relevant period prior to filing suit even if the plaintiff first learned of the contamination long ago. Thus, *McDonnell* goes well beyond the discovery rule mandated by CERCLA because it permits recovery more than five years after the plaintiff discovers that she has been harmed.

Of course, *McDonnell* does not permit a full recovery, because a plaintiff may only recover for contamination released during the relevant statutory period immediately before suit was filed. However, as a practical matter, this may be a relatively unimportant limitation. For example, in the *McDonnell* case, it is likely that the discharges occurring more than five years prior to filing suit caused exactly the same sort of damages caused by the later discharges. Thus, the plaintiff in *McDonnell* was likely able to recover for damages similar to those he would have obtained had his suit explicitly sought damages as a result of all discharges since 1969. However, if a plaintiff is unable to prove the amount of damage caused within the actionable time frame, evidence of harm may not be admissible.[26]

McDonnell may be somewhat difficult to apply to differing factual scenarios.[27] One difficulty with the *McDonnell* analysis is that the dividing line between permanent and intermittent wrongs is unclear. *McDonnell* itself offers a somewhat confusing standard. It explains that permanent wrongs are those which "produce[] all the damage which can ever result from it…." Conversely, for intermittent wrongs, each occurrence "inflicts a new injury…." Thus, the test appears to be whether the defendant's initial wrongful action caused all of the plaintiff's harm or whether the plaintiff suffers additional harm in the future as a result of additional actions or inactions by the defendant.

As a preliminary matter, this standard may be in tension with the slight injury rule discussed above. The slight injury rule provides that if any injuries are suffered by the plaintiff, the statute of limitations accrues. Under this rule, even if substantial damages do not occur until a later date, the statute of limitations for all damages accrues when the initial damages, no matter how slight, are suffered. It may be possible to resolve the apparent tension between the slight injury rule

and the analysis employed in *McDonnell*. In *McDonnell* the pumping station continued to overflow onto the plaintiff's property. The slight injury rule, it might be argued, is only properly applied to cases where there is a single release of, and a single exposure to, chemicals which thereafter causes harm incrementally. This distinction between a single release of chemicals and multiple releases may also be relevant for other reasons, as discussed below.

McDonnell involved discharges onto the plaintiff's property even at the time suit was filed. However, in many environmental actions, while the damage continues due to the passive migration of chemicals in the environment, the active discharge by the defendant ceased long ago. Though at the heart of many environmental disputes, the application of *McDonnell* to cases of passive yet continuing migration is an issue currently unresolved in Virginia.

Consider, for example, a plaintiff who files suit against the owner of a neighboring landfill. The landfill stopped accepting waste and was closed ten years ago. The plaintiff alleges that the landfill has released, and continues to release, contaminants onto the plaintiff's property through groundwater and a small stream. The plaintiff knew about these releases more than five years ago but only recently filed suit against the owner of the landfill. Under these circumstances, are the plaintiff's state law claims time barred?

The answer is unclear. If the landfill's gradual release of contaminants into the ground and surface water, which then migrate to the plaintiff's property, is a permanent wrong, then the plaintiff's cause of action is time barred. However, if the releases are considered intermittent, the plaintiff can recover damages as a result of releases during the previous five years.

While this issue has not been definitively addressed by the Virginia Supreme Court, other jurisdictions have held that continuing damages, unaccompanied by continuing tortious action, are insufficient to constitute an intermittent wrong for these purposes. These courts have held that passive migration of contamination released into the environment long ago is not a continuing tortious action.[28]

Other cases, however, have reached a contrary conclusion, holding that continuing passive migration of contamination constitutes an intermittent wrong. For example, in *Neiman v. NLO, Inc.*,[29] the court held that continuing effects of historical releases were actionable as intermittent torts. In *Neiman*, the plaintiff sued the defendants, former operators of a nuclear facility, contending that a nuclear release had occurred which contaminated the plaintiff's property. The defendants raised the statute of limitations because their operation of the nuclear facility allegedly ended in 1985, and the plaintiff did not file the suit until 1994. The court concluded that "under the Restatement, a claim for continuing trespass is not defeated where the defendant's last affirmative act of wrongdoing precedes the filing of the complaint by a period longer than the statute of limitations."[30] Under Ohio law, "a claim for continuing trespass may be supported by proof of continuing damages and need not be based on allegations of continuing conduct."[31]

In *Murray v. Bath Iron Works Corp.*,[32] the court reached a similar result. In that case, the plaintiffs lived near a landfill which, they alleged, contaminated their property. Certain of the plaintiffs first discovered contamination of their property in 1978. The defendant ceased using the landfill in 1985 and the landfill was closed in 1986. Suit, however, was not filed until 1993, and the plaintiffs alleged that the landfill continued to contaminate their property. Not surprisingly, the defendant raised the statute of limitations, which was six years. The court concluded that the action was not time barred, holding that "[t]o the extent that the plaintiffs can show that wastes from the site continue to be present on their land, regardless of when they entered, they can maintain an action for continuing trespass under Maine law, since that tort would be continually occurring for statute of limitations purposes."[33] Moreover, the court also ruled that "[a]s long as the nuisance continues unabated, a plaintiff may bring successive actions for damages throughout its continuance with the statute of limitations providing no bar, again since the tort is ongoing."[34]

Similarly, in *Cate v. Transcontinental Gas Pipe Line Corp.*,[35] the court held that the operation of a natural gas pipeline compressor, which caused nitrogen dioxide emissions and loud noises, was an intermittent nuisance because the effects of the nuisance were intermittent and because the source of the nuisance may be capable of abatement. The court explained:

> Rather than "flooding" plaintiffs once and for all time with loud noises, the facility peppers plaintiffs with the nuisance…[T]he court doubts that the houses are in a constant state of vibration. Rather, it is a periodic, albeit frequent, state of vibration that plaintiffs must endure. Finally, the complaint alleges that the emissions from the facility create health hazards, cause physical discomfort, and aggravate health concerns. The court concludes that such effects are not of a permanent nature. Rather, the existence of such nuisances will tend to fluctuate with the prevailing winds, weather patterns, and industrial activity. It would appear that all the alleged nuisances caused by the operation of the facility may well be candidates for a substantial abatement.[36]

Finally, in the case of *Arcade Water District v. United States*,[37] the court also determined that continuing effects of historical releases may be actionable as intermittent torts. In this case, the Arcade Water District filed suit in 1984 against the Air Force claiming that the Air Force's laundry contaminated, and continued to contaminate, the plaintiff's well. The Air Force's laundry was closed in 1973, and the applicable statue of limitations under California law was two years. Thus, the issue was whether the continuing contamination of the well from the now closed laundry was an intermittent nuisance. The court held it was. It reasoned that, in determining whether the nuisance was continuing, the "most salient allegation is that contamination continues to leak into Arcades Well 31."[38] The court also reasoned that, because the nuisance might abate over time, and because the leaking from the old laundry site might be capable of remediation, the nuisance may be temporary. Accordingly, the court ruled that the suit was not barred by the statue of limitations.[39]

Some older Virginia cases applying the same theory as *McDonnell* offer some different standards to distinguish between permanent and intermittent wrongs. Some suggest that an injury is permanent if the structures causing it are permanent or if the damages have occurred continuously from the time that the hazardous chemicals first entered the plaintiff's property. Consider, for example, *Magruder v. Virginia-Carolina Chemical Co.*,[40] in which the plaintiff complained of the defendant's past, current, and future disposal of water used in ore-washing into a river that flowed onto the plaintiff's property. The trial court held that the cause of action was barred by the five year statute of limitations and the Virginia Supreme Court affirmed. The Court explained that the "firmly established rule of law in this jurisdiction [is] that where there is a permanent nuisance, the consequences of which, in the normal course of things, will continue indefinitely, there can be but a single action therefore…."[41] The Court held that since the defendant's plant, when constructed, was designed to be permanent, and that as long as it operated the nuisance would be constant, the cause of action was time barred unless commenced within five years from the date of the first pollution of plaintiff's land.[42]

It is not clear that *McDonnell* and *Magruder* are completely consistent. Surely, in *McDonnell* the pumping station was just as permanent a structure as the defendant's plant in *Magruder*. Moreover, just as in *Magruder*, that pumping station, as long as it operated, would continue to periodically effect the plaintiff's property. The only distinction is the pollution of the stream in *Magruder* was apparently continuous and the overflows in *McDonnell* only occurred during heavy rains or other times when wastewater volume increased.

Magruder's reliance on the alleged permanency of the defendant's operations as a factor relevant to the running of the statute of limitations seems to be further called into question by *Norfolk and Western Railway Co. v. Allen*,[43] a case decided two years prior to *Magruder*. In *Allen*, the plaintiff sued the railroad claiming that the railroad's steam pumping station, which used water from a stream which flowed through the plaintiff's property, took so much water so as to interfere with the plaintiff's use of the same stream to power a grain mill. The railroad's steam pumping station commenced operations in 1903 and the plaintiff instituted suit in 1912. However, the plaintiff alleged he suffered no damage from the steam pumping operations until 1907, when the pumping station installed larger pipes and removed much more water from the stream.

The railroad argued that, because the pumping station was permanent, the statute of limitations started running in 1903, when the pumping station was built and commenced operations. The Virginia Supreme Court disagreed. The Court held that the permanency of the railroad's pumping station was irrelevant: "[w]hether or not the tank and the pump connected therewith constituted a permanent structure was an immaterial question in this case."[44] The Court explained that it was the diverting of water, which was not continuous, that was harmful to the plaintiff and that the pumping station itself did not damage the plaintiff.[45]

In *Spicer v. City of Norfolk*,[46] the circuit court considered whether allegedly continuing migration of pollution to neighboring property as the result of a now defunct facility constituted a permanent or intermittent nuisance for purposes of applying the statute of limitations. While the court did not definitively answer this question, it did review the relevant standards. The court first noted that, while there was Virginia case law to the contrary, "the ability to abate the nuisance does not determine whether a nuisance is permanent or temporary for statute of limitations purposes…."[47] The court held that a nuisance is permanent for statute of limitations purposes when "either (1) the damages are of a permanent character and go to the entire value of the plaintiff's property or (2) the nuisance is permanent, the consequences of which in normal course of things will continue indefinitely."[48] The court concluded that "[i]n distinguishing between permanent and temporary nuisances, the only factor the Supreme Court has stated is whether human labor is necessary before an injury can occur or, stated differently, whether the injury

inflicted depends upon the use of the property…."[49] While the court noted that permanence is ordinarily a question of fact for a jury, in "proper circumstances" it may be a question of law.

Conclusion

Virginia's statutes of limitation applicable to environmental actions are strict and may result in claims being barred before a plaintiff has a reasonable opportunity to assert her rights. In most cases, the statute of limitations starts to run when the plaintiff is injured. However, in many environmental cases, the accrual dates provided by Virginia law are irrelevant as federal law has substituted a discovery accrual date. However, in certain cases, plaintiffs will desire to assert claims which occurred substantially after they were injured by the contamination and after they first learned of the contamination. Under these circumstances, plaintiffs must argue that the contamination is intermittent and that all damages occurring in the relevant period before suit is filed are not time barred.

---

[1] *Lavery v. Automation Management Consultants*, 234 Va. 145, 158, 360 S.E.2d 336 (1987).

[2] VA. CODE ANN. § 8.01-243(B).

[3] VA. CODE ANN. 8.01-243(A).

[4] While there are exceptions to this rule, these exceptions are not generally applicable to actions alleging damage as a result of the release of hazardous chemicals. Accordingly, these exceptions, which may apply in some instances, are not addressed herein.

[5] *See*, *e.g.*, *Williams v. E.I. DuPont de Nemours and Co.*, 11 F.3d 464, 466 (4th Cir. 1993).

[6] *Id*.

[7] 782 F.2d 30 (4th Cir. 1985).

[8] *Id*. at 34.

[9] 635 F. Supp. 366 (W.D. Va. 1986).

[10] *Id*. at 369, n. 3.

[11] 221 Va. 951, 275 S.E.2d 900 (1981).

[12] Virginia has now provided, by statute, for a discovery statute of limitations for asbestos actions. *See* VA. CODE ANN.§ 8.01-249(4).

[13] *Id*. at 957-958.

[14] 117 Va. 763, 86 S.E. 115 (1915).

[15] *Id*. at 767 (emphasis added).

[16] In a recent decision, *Spicer v. City of Norfolk*, 46 Va. Cir. 535, 546-47 (Norfolk 1996), the court discussed allegedly continuing migration from historical operations at a now defunct facility. The court noted that "the first entry of pollutants onto a plaintiff's property will not necessarily constitute damage for purposes of the accrual of a nuisance cause of action unless the quantity is so great as to constitute a nuisance. When the damage first occurred is a question for the jury." *Id*. at 546 (citations omitted). Whether the standard for such injury was subjective or objective was not addressed.

[17] 42 U.S.C. § 9601 *et seq*.

[18] 42 U.S.C. §§ 9658(a)(1), (b)(4)(A).

[19] 42 U.S.C. § 9601(14).

[20] 42 U.S.C. § 9601(33).

[21] 42 U.S.C. § 9601(8).

[22] 42 U.S.C. § 9601(9).

[23] *Knox v. AC & S, Inc.*, 690 F. Supp. 752, 757 (S.D. Ind. 1988); *accord In re Hanford Nuclear Reservation Litigation*, 780 F. Supp. 1551, 1574 n.42 (E.D. Wash. 1991); *see also First United Methodist Church v. U.S. Gypsum Co.*, 882 F.2d 862, 867 n.8 (4th Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990) (explicitly reserving judgment on this issue).

[24] *Kowalski v. Goodyear Tire and Rubber Co.*, 841 F. Supp. 104, 107 (W.D.N.Y. 1994) ("There is nothing in the language of the section that requires an underlying CERCLA action in order to apply the federally required commencement date preemption of the state statute of limitations.").

[25] 234 Va. 235, 239, 360 S.E.2d 841 (1987).

[26] *See Cooper v. Whiting Oil Co.*, 226 Va. 491, 496, 311 S.E.2d 757 (1984).

[27] Importantly for plaintiffs, whether the defendant's actions are permanent or intermittent seems to be a question of fact to be resolved by a jury. *Virginia Hot Springs Co. v. McCray*, 106 Va. 461, 471, 56 S.E. 216 (1907).

[28] *See*, *e.g.*, *M.R. (Vega Alta), Inc. v. Caribe General Elec. Products, Inc.*, 31 F. Supp. 2d 226, 240 (D.P.R. 1998) ("For there to be a continuous tort, Defendants must be continuously acting, *i.e.*, continuing to dump pollutants on Plaintiffs' land. Defendants are not continuously acting when the pollutants entering the land are doing so without any further impetus on the part of the Defendants beyond that committed in 1988."); *Sable v. General Motors Corp.*, 90 F.3d 171, 176 (6th Cir. 1996) ("[T]he defendants' actions here are not of a continuing nature; defendants ceased dumping on plaintiff's land in 1974. Since there were no continuing tortious acts within three years from the date plaintiff filed the cause of action, only continual harmful *effects*, plaintiff's reliance on the continuing-wrongful-acts doctrine is misplaced.") (italics in original); *Powell v. City of Danville*, 625 N.E.2d 830, 831 (Ill. App. Ct. 1993) ("While the effects may be continuing because of the leaching, the tortious act ceased prior to 1975."), *appeal denied*, 633 N.E.2d 14 (Ill. 1994); *see also Dombrowski v. Gould Electronics, Inc.*, 954 F. Supp. 1006, 1013 (M.D. Pa. 1996) ("There is no doubt in the Court's mind that it is a permanent trespass, for any alleged invasion occurred prior to this litigation.…Since the alleged invasions or trespasses constitute permanent invasions, the statute of limitations began to run "from the time [the emission] first occurred, or at least from the date it should reasonably have been discovered.") (quoting *Sustrick*, 413 Pa. at 326, 197 A.2d 44) (brackets in original).

[29] 108 F.3d 1546, 1555 (6th Cir. 1997).

[30] *Id*. at 1557 (footnote omitted).

[31] *Id*. at 1559.

[32] 867 F. SUPP. 33, 48 (D. Me. 1994).

[33] *Id*. at 48.

[34] *Id*. (citations omitted).

[35] 904 F. SUPP. 526, 539 (W.D. Va. 1995)

[36] *Id*. at 539 (citations omitted).

[37] 940 F.2d 1265 (9th Cir. 1991)

[38] *Id*. at 1268.

[39] *See also In re Tutu Wells Contamination Litigation*, 846 F. SUPP. 1243, 1257 (D.V.I. 1993) ("As other courts have explained, where the wrongful conduct continues and the nuisance is maintained, every continuance tolls the statute of limitations. Because the invasion to the [plaintiffs'] wells continues, and the Plaintiffs have argued that the question as to whether the damage is permanent or temporary is to be determined, Plaintiffs' nuisance claims are timely under the two year statute of limitations.") (citations omitted); *325-343 E. 56th Street Corp. v. Mobil Oil Corp.*, 906 F. Supp. 669, 675-676 (D.D.C. 1995) (The court held that a subsequent owner's claims against the prior owners for cleanup costs incurred as a result of spills from a gasoline service station are deemed to constitute a continuing tort. Thus, the court held, claims could be

asserted in 1993 despite the fact that the property had not been used as a gasoline station since 1974.)

[40] 120 Va. 352, 91 S.E. 121 (1917).

[41] *Id*. at 354.

[42] *Id*. at 354-55; *accord Worley v. Mathieson Alkali Works*, 119 Va. 862, 866, 89 S.E. 880 (1916) (holding that the plaintiff's claims against a chemical plant for poisoning a downstream river were barred by the statute of limitations because the defendant's plant commenced operations in 1895, more than five years before suit was filed, and "the damage alleged to have been sustained by the plaintiff has resulted from a cause permanent in its character.").

[43] 118 Va. 428, 435, 87 S.E. 558 (1915).

[44] *Id*. at 431.

[45] *Id*. at 431-32.

[46] 46 Va. Cir. 535, 546-47 (Norfolk Cir. Ct.1996)

[47] *Id*. at 546. However, the court noted that whether the nuisance was abatable might affect whether damages were of a permanent character and, accordingly, the amount of the plaintiff's recovery. *Id*.

[48] *Id*.

[49] *Id*. at 547 (citation omitted).

A Sustainable Balance Between Agriculture and Growth?

by Amy L. Pierce

According to a 1997 study by the American Farmland Trust, every state in this country is experiencing the conversion of high quality farmland to suburban development.[1] Each year the nation loses a million acres of irreplaceable agricultural land.[2] So far, the vast agricultural resources of the United States have masked this problem. However, the long-term implications are clear. Not only does this trend threaten the viability of the United States as a food exporter, but with it comes the simultaneous loss of open space, wildlife habitat, groundwater recharge areas, wetlands and other benefits attributable to farmland.[3] Furthermore, the conversion of farmland to suburban uses increases the development pressures on adjacent lands. While Virginia may not be one of the major agricultural producing states in the nation, in 1997 agricultural operations occupied over 8.2 million acres of the Commonwealth and produced $2.34 billion in revenue from the products sold.[4]

Since 1982, Virginia has lost over 1.2 million acres of farmland.[5] Much of the land being lost is prime or unique farmland, disproportionately located near metropolitan areas.[6] The Northern Piedmont farming region has long been threatened by the ever-burgeoning Washington, DC metropolitan area. This resulted in rapid growth in traditionally rural counties. For example, Loudoun County's population grew 64 percent between 1980 and 1992.[7] This phenomenon spread down the Route 29 corridor to Culpeper and Albemarle Counties (22.6 and 28.8 percent increases in population between 1980 and 1992, respectively).[8] Other endangered fertile farmland is located in Southeastern Virginia, near the Cities of Chesapeake, Virginia Beach and Hampton Roads. This same pattern is occurring nation-wide because prime farmland is often located near growing metropolitan areas and is the most attractive for development because of its well-drained soils and lack of steep slopes, resulting in lower development costs.[9]

The conversion of this prime agricultural land to non-agricultural uses results in many long-term consequences, only one of which is the removal of a parcel from agricultural productivity. All related amenity benefits, including open space, protection of groundwater recharge areas and wetlands, and preservation of wildlife habitats, associated with this parcel disappear. However, in addition to these primary effects, the conversion of a parcel to a non-farm use has a potentially more important and far-reaching secondary impact on surrounding parcels. The conversion of one parcel can create tremendous development pressures on adjacent land.[10] This happens for several reasons.

One reason involves pure economics: the value of the land if developed is usually substantially higher than the potential income of the farm. Often farmers are forced to sell for this reason alone. As development occurs around them, the taxes on their property rise and can make retaining the land in an agricultural use financially impossible. Another reason is that the development of one parcel decreases the potential productivity of surrounding farmland. The nature of farming creates a high potential for nuisance conflicts with scattered residential development. To mitigate potential conflicts with the odor, noise and dust of farming operations, localities will often limit a farm's current or future use.[11] Furthermore, the potential of a nuisance suit to enjoin a farm's operations increases as the level and expense of the surrounding development increases. The only way to mitigate these secondary impacts of conversion of land to non-agricultural uses is through governmental measures aimed at protecting farming and reducing development pressures.

The importance of farming is recognized at the federal level through a variety of federal laws, rules and policies. The Federal Agricultural Im-provement and Reform Act of 1996, as known as the 1996 Farm Bill, recognizes a broad commitment to conservation, protecting the environment and supporting the agricultural trade and the future of farming.[12] However, this same importance is often not recognized

at the state and local levels. In Virginia, state and local government policies have the most impact on the operations of farms and the future of farming in the state. The state does have a Right to Farm Act, codified at *Va. Code Ann*. §§ 3.1-22.28 and 3.1-22.29. Right to farm laws are designed to strengthen the legal position of farmers when neighbors sue them for private nuisance and to protect farmers from anti-nuisance ordinances and unreasonable controls on farming operations. House Bill 863, which was under consideration in the 1999 legislative session of the General Assembly, sought to further limit the circumstances under which farming operations may be deemed a nuisance.[13] The bill provided that no agricultural operation would be deemed a nuisance "by any changed conditions in or about the locality thereof after the same has been in operation for more than a year."[14] The bill died in committee and was not carried over to the 2000 session.

The Commonwealth permits agricultural districting, which is a voluntary policy for protecting land in agriculture. In agricultural districting, a participant sets aside an area of farmland to remain undeveloped for a fixed period of time.[15] They are generally thought to be an ineffective strategy for preserving land near urbanized areas and they are ineffective as planning tools.[16] A 1993 study of agricultural preservation programs in Maryland, Pennsylvania and Virginia study showed that most of the agricultural districting programs failed to discourage land speculation in farmland, prevent farm disinvestment or preserve farmland at a pace equal to that of development.[17]

Virginia also has a law known as the Open Space Land Act, codified at *Va. Code Ann*. §§ 10.1-1700–1705. The Act furnishes a tool for any public body to acquire interests or rights in real property that will provide for the preservation or provision of open space and designate any real property in which it has an interest to be retained and used for open space.[18] After acquisition, the public body may make the land available for agriculture or timbering uses.[19]

The largest program to take advantage of the powers contained in the Open Space Land Act is the City of Virginia Beach's Agricultural Reserve Program (ARP). Enacted in 1995, the ARP is a voluntary program that pays market value for perpetual easements over prime farm and forested land through the purchase of development rights (PDR).[20] PDR programs retire the development rights of land and allow it to remain open without development pressures. As of 1997, the program had approved the purchase of easements for over 3,000 acres and had pending applications for another 3,500 acres.[21] This program has allowed, and will continue to allow, the southern half of Virginia Beach to remain in agricultural use, despite its close proximity to the cities of Virginia Beach and Norfolk. Albemarle County has also instituted a PDR program.

In spite of local efforts like this across the nation to protect open space and farmland, uncontrolled urban growth and its effects have recently grasped the attention of citizens and lawmakers alike. In some form or other, growth questions appeared on over 200 ballot questions across the country in the November 1998 election.[22] By that time, both the National Trust for Historic Preservation and the Sierra Club had made sprawl a high priority.[23] Beginning in 1998, the Clinton Administration promoted "smart growth" initiatives to encourage planned growth and protection of farms and endangered habitats.[24] Lawmakers and citizens in Virginia have been equally concerned. A coalition of officials from 23 of the state's fastest growing counties and cities, the Coalition of High Growth Communities, formed in 1998 and has met regularly.[25] In November 1998, a statewide seminar entitled "Can Agriculture and Growth Co-Exist?" was sponsored by Virginia Tech's Rural Economic Analysis Program and the Program for Community Vitality. In addition, Joint Study Committees were underway in various forms in the General Assembly in 1999 and 2000.

The "Can Agriculture and Growth Co-Exist?" seminar presented facts and figures on agricultural production trends and prospects for the future of farming in Virginia.[26] According to a survey of 21 planning directors in Virginia conducted before the seminar, the top two challenges facing agriculture in the state are economic issues (high land value in relation to farm profits) and suburban growth pressures.[27] These challenges have led to a reduction in the number of farms and an increase in the acreage and number of livestock necessary to produce a viable income.

In the 1999 and 2000 legislative sessions, numerous subcommittees held the latest rounds of discussions within the General Assembly on growth management tools and techniques. Unfortunately, these subcommittees seem to have trotted over much of the same ground covered by previous committees of the Assembly in the 1960s and 1980s to tackle growth issues.[28] However, S.J.R. 76 on the Future of Virginia's Environment has been continued to study and develop visions for Virginia's future throughout the 2001 session.[29] And S.J.R. 134 established a farmland protection task force to develop a comprehensive farmland protection policy for the Commonwealth.[30]

More significantly, the fiscal year 2000 budget included $115,000 over the two years to establish the Virginia Agricultural Vitality Program, an innovative project within

the Department of Agriculture and Consumer Services. The Vitality Program's goal is to preserve farmland and the business of farming in Virginia through two complementary initiatives. The first initiative seeks to help localities develop and implement purchase of development rights programs, similar to the program in Virginia Beach. The second initiative will help to link retiring farmers with young, aspiring farmers and provide state assistance in business and estate planning.[31] The $115,000 allocated in last year's budget is merely seed money to establish the program. Much more money will be needed for the initiative to succeed. The Virginia Farm Bureau plans on asking the 2001 General Assembly to provide at least $20 million for the project.[32]

What remains to be seen is what will become of the Agricultural Vitality Program and what might come out of the General Assembly in the way of substantive legislation aimed at controlling growth and protecting agricultural land. If agriculture is to remain a viable and productive sector of Virginia's economy and rural, open space is to remain a characteristic of the landscape, more proactive support by the legislature is needed. Now is the only time to preserve agricultural land. After its conversion to non-farm uses, restoration to agricultural viability, while perhaps technically possible, would be prohibitively expensive.[33] Amendments to the Right to Farm Act are necessary to protect existing farms from encroaching residential development. Agricultural districting and the Open Space Land Act are very worthwhile programs. Nonetheless, they need to be supplemented and local governments need to be encouraged or directed to implement farm preservation programs of the state or local design. This goal can be accomplished through the proposed Agricultural Vitality Program. Its future funding is critical to halting the loss of farmland in Virginia.

There is an extreme amount of interest in uncontrolled and unplanned growth at the present time. The General Assembly has spent much time and effort investigating its effects and ways to accommodate growth while protecting the environment and preserving open space. The seed money for the proposed Agricultural Vitality Program was the most promising move by the 2000 General Assembly in this regard. However, it remains to be seen whether the 2001 General Assembly will enact needed legislation and fully fund the Agricultural Vitality Program or, as in past decades in Virginia's history, the enthusiasm for controlled growth fades away.

---

[1] A. Ann Sorensen, Richard P. Greene & Karen Russ, *Farming on the Edge*, American Farmland Trust Center for Agriculture in the Environment, Northern Dekalb University, March 1997, at 1.

[2] *Id*.

[3] *Id*.

[4] United States Department of Commerce, Bureau of the Census: Census of Agriculture. 1997.

[5] *Id*.

[6] Andrew D. Carver & Joseph E. Yahner, *Defining Prime Agricultural Land and Methods of Protection*, Perdue Cooperative Extension Service, ¶ 3 (1996) <http://www.agry.perdue.edu/agronomy/landuse/prime.htm>.

[7] A. Ann Sorensen, Richard P. Greene & Karen Russ, *Farming on the Edge*, American Farmland Trust Center for Agriculture in the Environment, Northern DeKalb University, March 1997, at 8.

[8] *Id*.

[9] Andrew D. Carver & Joseph E. Yahner, *Defining Prime Agricultural Land and Methods of Protection*, Perdue Cooperative Extension Service, ¶ 5 (1996) <http://www.agry.perdue.edu/agronomy/landuse/prime.htm>.

[10] *Id* at ¶ 6.

[11] *Id* at ¶ 7.

[12] Agricultural Improvement and Reform Act of 1996, Pub. L. No. 104-127, 110 Stat. 888 (1996).

[13] H.B. 863, 1999 Sess. (Va. 1999).

[14] *Id*.

[15] Nancy J. Volkman, *Vanishing Lands in the USA: the use of agricultural districts as a method to preserve farmland*, Land Use Policy, Jan. 1987, at 14.

[16] *Id*.

[17] George J. Maurer, *Evaluation of Agricultural Preservation Programs in Maryland, Pennsylvania and Virginia* (1993).

[18] Va. Code Ann. § 10.1-1701 (1998).

[19] Va. Code Ann. § 10.1-1702 (1998).

[20] Jeryl Rose Phillips, *Can Agriculture and Growth Co-Exist?*, VAPA Newsbrief, (Va. Chapter of the American Planning Assoc., Midlothian, Va.), Jan.-Feb. 1999, at 8.

[21] *Id*.

[22] *High Growth: A Hot Topic All Over*, VAPA Newsbrief (Va. Chapter of the American Planning Assoc., Midlothian, Va.), Nov.-Dec. 1998, at 3.

[23] *Id*.

[24] *Clinton Budget Pushes Smart Growth*, Open Land, Planning, Feb. 1999, at 24.

[25] *Squaring Off in Virginia*, Planning, Feb. 1999, at 33.

[26] Jeryl Rose Phillips, *Can Agriculture and Growth Co-Exist?*, VAPA Newsbrief, (Va. Chapter of the American Planning Assoc., Midlothian, Va.), Jan.-Feb. 1999, at 7.

[27] *Id*.

[28] Bill Ernst, *The Legislative Prospect*, VAPA Newsbrief, (Va. Chapter of the American Planning Assoc., Midlothian, Va.), Jan.-Feb. 1999, at 5; S.J.R. 76, 2000 Sess. (Va. 2000); S.J.R. 134, 2000 Sess. (Va. 2000), H.B. 713, 2000 Sess. (Va. 2000).

[29] S.J.R. 76, 2000 Sess. (Va. 2000).

[30] S.J.R. 134, 2000 Sess. (Va. 2000).

[31] Virginia Farm Bureau Federation, Virginia Ag Initiative <http://www.savefarms>.

[32] Greg Edwards, *Media Blitz Slated for Farmland Effort*, Richmond Times-Dispatch, Sept. 14, 2000.

[33] Andrew D. Carver & Joseph E. Yahner, *Defining Prime Agricultural Land and Methods of Protection*, Perdue Cooperative Extension Service, ¶ 5 (1996).

Compliance Checkup: Virginia's New Industrial Storm Water General Permit

by Matthew L. Iwicki, Esquire, Gentry Locke Rakes & Moore, & James S. Willis, III, P.E., P.G., Engineering Consulting Services, Ltd.

Virginia's new Industrial Storm Water General Permit covering "point source" discharges of storm water "associated with industrial activity" to surface waters of the Commonwealth became effective June 30, 1999.[1] The general permit mandates the development and implementation of a facility-specific Storm Water Pollution Prevention Plan (SWPPP) for each covered facility, and various monitoring and sampling requirements depending on a facility's industry sector.[2] Point source discharges are those that flow through any discernable, defined and discrete conveyance (such as a ditch, channel or swale), as compared to uncollected "sheet-flow" run-off.[3] Facilities conducting industrial activities required to have registered under the general permit (or to have obtained an individual permit) generally include those within Standard Industrial Classification (SIC) codes 10-14, 20-45, 50 and 51, with many specific exceptions or limitations.[4] A facility may qualify for an exemption from the requirement to obtain a permit if it properly certifies to the Virginia Department of Environmental Quality (DEQ) that storm water is not contaminated by exposure to industrial activity at the facility.[5]

The SWPPP must identify potential sources of storm water pollution, and detail measures to limit contamination of storm water and assure compliance with the other requirements of the general permit such as training, inspections, and maintenance.[6] The SWPPP must also contain a certification that the discharge has been tested or evaluated for the presence of non-storm water discharges, which generally must be individually permitted.[7]

All covered facilities are required to obtain and visually inspect quarterly grab-samples of storm water discharges for obvious signs of contamination.[8] Facilities in numerous sectors (*e.g.* timber products, chemicals and allied products manufacturing, landfills, automobile salvage yards, scrap/waste recycling, food and kindred products, concrete products, transportation, printing, fabricated metal products, mining and many others) are required to obtain and analyze samples for specified pollutants of concern (POCs) twice a year, during years two and four of the general permit, in order to determine the effectiveness of their SWPPPs.[9] Many facilities are also subject to enforceable numeric effluent limitations under the general permit and must obtain and analyze samples for the limited contaminants annually to verify compliance.[10]

For most covered facilities, the SWPPP, including any revisions required to comply with the new general permit, must have been prepared and implemented no later than March 26, 2000.[11] If construction is required to fully implement measures required by the plan, reasonable interim measures must be taken and full compliance must be achieved as soon as practicable, but no later than June 30, 2002.[12]

If a facility is currently operating under the general permit, it should be conducting quarterly visual monitoring of its storm water discharges and maintaining the reports of the observations on-site with its SWPPP.[13] Facilities subject to numeric effluent limitations or in sectors required to conduct semi-annual sampling for POCs in years two and four of the permit should have in place a program for the required sampling, analysis and reporting.[14] A facility's obligations under the general permit should be carefully reviewed; if the facility is subject to numeric effluent limitations and/or is required to conduct semi-annual sampling in years two and four of the permit and it misses the deadlines for submitting the data to DEQ, it could be inviting unwanted attention in the form of an enforcement action.

If a facility is subject to numeric effluent limitations and its discharge exceeds those limitations, it will be in violation of its permit and subject to enforcement action. Significant fines may be assessed,[15] and the facility will be required to undertake corrective measures such as reviewing its processes and operations and making corresponding changes to its SWPPP.[16]

If a facility is required to conduct semi-annual sampling in years two and four of the permit, the average concentrations of the POCs for the second year sampling events are compared to specified "monitoring cut-off concentrations" (MCOCs).[17] These MCOCs are not enforceable limits; rather, the facility and DEQ utilizes them to assist in evaluating whether the facility's SWPPP is adequate and being successfully implemented. If an annual average POC concentration during the second year exceeds the MCOC, the facility will likely be required to review and improve its SWPPP.[18] The sampling in the fourth year will demonstrate whether the improvements were effective. If the annual average concentrations for the POCs in the second year do not exceed the MCOCs, the fourth year sampling may be waived (on a pollutant-by-pollutant and discharge-by-discharge basis) provided that the

facility continues to implement the successful SWPPP.[19]

If either numeric effluent limitations or MCOCs are exceeded, the facility should be prepared for an inspection by the DEQ. At this point legal and technical advice is essential. One focus of the inspection will be the SWPPP. If the SWPPP is not up-to-date or if there is no documentation for the required activities, the DEQ may consider the facility to be out of compliance with the general permit. Regardless, as discussed above, changes to the facility or its practices and procedures will be required to eliminate the exceedances.

[1] *See* 9 VAC 25-151-10 *et seq*. (General Virginia Pollutant Discharge Elimination System (VPDES) Permit for Discharges of Storm Water Associated with Industrial Activity); 15 VA. REG. 1160 (January 18, 1999) (Final Regulation).

[2] *See* 9 VAC 25-151-70 (general permit conditions applicable to all storm water discharges associated with industrial activity); 9 VAC 25-151-80 (storm water pollution prevention plans); 9 VAC 25-151-90 *et seq.* (additional requirements for facilities within specified industry sectors).

[3] *See* 9 VAC 25-31-10 (definition of "point source") ("'Point source' means any discernible, confined, and discrete conveyance, including but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, landfill leachate collection system, vessel or other floating craft from which pollutants are or may be discharged. This term does not include return flows from irrigated agriculture or agricultural storm water runoff."). Storm water discharges associated with industrial activity through municipal or non-municipal separate storm sewer systems to surface waters are also eligible for coverage under the general permit. *See* 9 VAC 25-151-20.

[4] *See* 9 VAC 25-151-10 (definitions of "industrial activity" and "storm water discharge associated with industrial activity").

[5] *See* 9 VAC 25-151-60 C (no exposure certifications).

[6] *See* 9 VAC 25-151-80 (storm water pollution prevention plans).

[7] *See* 9 VAC 25-151-80 D.3.g (1) (certification of testing and evaluation for the presence of non-storm water discharges); 9 VAC 25-151-70 D.1 (requiring most non-storm water discharges to be individually permitted).

[8] *See* 9 VAC 25-151-70 C.8 (quarterly visual examinations of storm water quality).

[9] *See* 9 VAC 25-151-70 C.2-7 (monitoring for POCs).

[10] *See* 9 VAC 25-151-70 B (numeric effluent limitations and compliance monitoring).

[11] *See* 9 VAC 25-151-80 A.1 (deadline for SWPPP preparation and compliance for existing facilities).

[12] *See* 9 VAC 25-151-80 A.4 (deadline for SWPPP compliance where measures require construction).

[13] *See* 9 VAC 25-151-70 C.8.b (maintenance of visual examination reports).

[14] *See* 9 VAC 25-151-70 B.2 (compliance monitoring and reporting for numeric effluent limitations); 9 VAC 25-151-70 C.7 (reporting of monitoring results); 9 VAC 25-151-70 E.3 (reporting monitoring results on DMRs); 9 VAC 25-151-70 C.2 (analytical monitoring and reporting for POCs); 9 VAC 25-151-70 C.7 (reporting of monitoring results); *see also* 9 VAC 25-151-70 E.3 (reporting monitoring results on DMRs).

[15] *See* VA. CODE § 62.1-44-32 (providing for, *inter alia*, civil penalties not to exceed $25,000 per day for each violation of the State Water Control Law).

[16] *See*, *e.g.*, 9 VAC 25-151-80 B.3 (authorizing DEQ to order modifications to the SWPPP if it fails to meet the requirements of the general permit); 9 VAC 25-151-80 C (requiring permittee to amend the SWPPP if it proves ineffective in eliminating or significantly minimizing storm water contamination).

[17] *See* 9 VAC 25-151-70 C.4.b (low concentration waiver).

[18] *See* note 18, *supra*.

[19] *See* note 19, *supra*.

Environmental Marketing and the FTC Green Guides

by J. Brandon Holder

"It isn't easy being green."
— Kermit the Frog

Introduction

Environmental marketing emerged as an international phenomenon during the 1990s."[1] Soft drink bottles now admonish the consumer to "Please Recycle" and aerosol cans regularly announce "No CFCs." There are very few items for sale anywhere that are not marked in some fashion with the ubiquitous three-chasing-arrows symbol. In response, many consumers have changed their purchasing decisions based on environmental concerns. They avoid products believed to be environmentally harmful while purchasing products specifically because of environmental advertising or labeling. Consumers are even willing to pay more for products perceived as environmentally preferable.[2]

While the enormous growth of environmental marketing may generally be viewed as a positive trend, as with all new trends it does present a number of questions and problems. The purpose of this article is to examine the development of federal regulation in the area of environmental marketing. Specifically, emphasis will be placed on the efforts of the Federal Trade Commission ("FTC" or "Commission") to regulate environmental claims through the issuance of voluntary marketing guidelines.[3] These guidelines, issued in 1992 as Guides for the Use of Environmental Marketing Claims ("Green Guides" or "Guides"), are intended to accurately inform consumers while pro-

moting sound environmental practices and aiding industry in structuring legally permissible advertising and marketing claims.

Unique Problems in Environmental Marketing

The proliferation of "green" marketing has presented significant consumer protection problems. Former FTC Commissioner Roscoe B. Starek, III stated that "[w]hen environmental advertising mushroomed in the late 1980s and early 1990s, it seemed that many of the claims were exaggerated and concerns were expressed that there wasn't much truth in environmental advertising."[4]

Green marketing claims raise some unique concerns in addition to the obvious one associated with any form of false advertising. As one academic commentator has written, "[g]reen marketing is more problematic than certain other forms of advertising because consumers generally cannot substantiate environmental claims on their own. Although people can compare the taste of Coke and Pepsi, and observe their laundry after washing with Tide or Cheer, they generally cannot verify recycled content claims or statements about the ozone layer."[5] Furthermore, because consumers are willing to pay more for products that they believe are environmentally preferable, false advertising in this area may lead consumers to spend money for the wrong products. This hurts not only the consumer but also honest industry competitors.[6]

State Regulatory Efforts

Industry concern over a patchwork of state laws in this area was one of the initial considerations leading to FTC involvement and subsequent issuance of the Green Guides discussed below. A number of states have enacted environmental marketing laws.[7] All measures differ in their particulars, but it is not difficult to envision the compliance problems for companies making environmental marketing claims in different geographic markets. As of this writing, Virginia has limited its regulation to labeling of organic products.[8] California, in contrast, has a very detailed statute, prohibiting commonly-used environmental terms like "recycled" unless products meet certain criteria.[9]

The FTC Green Guides have helped to alleviate the problems of differing state laws. Several states, including California, New York, and Rhode Island, have either repealed or modified their laws concerning environmental marketing claims to be consistent with the Green Guides.[10] At least one state, Maine, has adopted the Green Guides into law.[11] Nevertheless, there are still many different approaches being pursued among the states. Counsel must be aware of applicable state laws because the FTC guidance does not preempt them.

The Green Guides

Development

FTC involvement in the area of environmental marketing began in the 1970s. In 1973 the Commission negotiated an industry-wide agreement on phosphate and degradability claims for detergents.[12] The FTC pursued a limited number of deceptive environmental claims on a case-by-case basis throughout the 1970s and early 1980s.[13] The need for increased regulation by the FTC was not evident until the late 1980s and early 1990s when environmental marketing came to the fore.

With states enforcing against deceptive or misleading environmental marketing claims under their own laws, businesses and advertisers were growing increasingly concerned about the potential development of differing or inconsistent standards on a state-by-state basis. These concerns were matched by the zeal of state law enforcers and environmental groups that continued to express concern about preventing deceptive claims.[14] As a result, the FTC received a number of petitions from members of industry and trade associations urging the Commission to issue uniform national standards for environmental marketing claims. A task force of state Attorneys General also recommended that national industry-wide guidance be provided.[15]

In May 1991 the Commission published a *Federal Register* notice requesting public comment on issues concerning environmental marketing and advertising claims and announcing that it would hold public hearings.[16] Comments were submitted by consumer and industry groups, environmental organizations, the U.S. Environmental Protection Agency ("EPA"), the U.S. Office of Consumer Affairs ("USOCA"), and state and local governments. The "overwhelming response from all quarters" supported issuance of FTC guides for environmental marketing.[17] In July 1992, the Commission responded by issuing Guides for the Use of Environmental Marketing Claims ("Green Guides"), codified at 16 C.F.R. Part 260.[18] On the day that the Guides were issued, FTC Chairman Janet D. Steiger addressed their purpose at a congressional hearing:

> Our goal is to protect consumers and to bolster their confidence in environmental claims, and to reduce manufacturers' uncertainty about which claims might lead to FTC law-enforcement actions, thereby encouraging marketers to produce and promote products that are less harmful to the environment. I

> believe these guides, together with vigorous law enforcement by the FTC and the states, go a long way toward achieving these goals.[19]

The Green Guides as issued in 1992 contained a provision for review after three years. The purpose of the review was "to seek public comment on the effectiveness of the Guides and on whether and how they should be modified to reflect changes in consumer understanding and developments in environmental technology."[20] After receiving comments and holding another set of public hearings, the Commission issued revised guides in October 1996.[21] Only minor changes were made as the Commission was still in the process of reviewing the "Recyclable" and "Compostable" guides (discussed below) and wanted to evaluate the results of relevant ongoing consumer research as to what meaning consumers assigned to these terms.

Following further consumer research and another public comment period, revised Green Guides were again issued on May 1, 1998.[22] They included expanded examples of legitimate and illegitimate "Recyclable" and "Recycled content" claims, as well as clarification that the Guides apply not only to traditional labeling and advertising practices but also to claims asserted through electronic media like the Internet. Copies of the current Green Guides are available from the FTC web site.[23]

Purpose and Scope

The FTC has enforcement authority for false or misleading environmental claims under Section 5 of the Federal Trade Commission Act ("FTC Act"), which generally prohibits "unfair or deceptive acts or practices in or affecting commerce."[24] The Commission's Policy Statement on Deception enumerates the three elements of a deceptive claim: (1) there must be a representation, omission or practice that is likely to mislead the consumer; (2) the act or practice must be considered from the perspective of a consumer acting reasonably in the circumstances; and (3) the representation, omission or practice must be material, *i.e.* it must be "likely to affect the consumer's conduct or decision with regard to a product or service."[25] Manufacturers and advertisers should note that they are liable not only for express but also for implied marketing claims. It is a basic yet frequently misunderstood aspect of FTC law that marketers are responsible both for what they expressly say and for what their claims imply.[26]

Under Section 5 of the FTC Act, anyone making a marketing claim must "possess and rely upon a reasonable basis substantiating the claim. A reasonable basis consists of competent and reliable evidence. In the context of environmental marketing claims, such substantiation will often require competent and reliable scientific evidence…."[27] The purpose of the Green Guides is to provide guidance on the application of Section 5 to environmental advertising and marketing practices.[28] As guidance, the Green Guides are not enforceable regulations, nor do they have the force and effect of law.[29]

Like Section 5 of the FTC Act itself, the scope of the Green Guides is quite broad. They apply to "environmental claims included in labeling, advertising, promotional materials and all other forms of marketing, whether asserted directly or by implication, through words, symbols, emblems, logos, depictions, product brand names, or through any other means, including marketing through digital or electronic means, such as the Internet or electronic mail."[30] The substantive portion of the Green Guides is divided into two sections, one stating general principles and the other providing specific guidance on environmental marketing claims.

General Principles

The Green Guides enumerate four general principles for environmental marketing claims. These principles, which are outlined below, are intended by the Commission to apply to all environmental marketing claims. Examples are provided for clarification and further examples are set forth in the Green Guides.

The first general principle requires that product and packaging "qualifications and disclosures… should be sufficiently clear, prominent and understandable to prevent deception."[31] The concern here is that "a disclosure that's too small or inconspicuous for a consumer to notice…isn't going to be very helpful."[32]

Second, "[a]n environmental marketing claim should be presented in a way that makes clear whether the environmental attribute or benefit being asserted refers to the product, the product's packaging, a service or to a portion or component of the product, package or service."[33] For example, a box of aluminum foil is labeled with the claim "recyclable," without further elaboration. Unless the type of product, surrounding language, or other context of the phrase establishes whether the claim refers to the foil or the box, the claim is deceptive if any part of either the box or the foil, other than minor, incidental components, cannot be recycled.[34]

Third, "[a]n environmental marketing claim should not be presented in a manner that overstates the environmental attribute or benefit, expressly or by implication. Mar-

keters should avoid implications of significant environmental benefits if the benefit is in fact negligible."[35] For example, consider a package labeled "50% more recycled content than before." The manufacturer increased the recycled content of its package from 2 percent recycled material to 3 percent recycled material. Although the claim is technically true, it is likely to convey the false impression that the advertiser has increased significantly the use of recycled material.[36]

Fourth, "[e]nvironmental marketing claims that include a comparative statement should be presented in a manner that makes the basis for the comparison sufficiently clear to avoid consumer deception. In addition, the advertiser should be able to substantiate the comparison."[37] For example, an advertiser notes that its shampoo bottle contains "20% more recycled content." The claim in its context is ambiguous. Depending on contextual factors, it could be a comparison either to the advertiser's immediately preceding product or to a competitor's product. The advertiser should clarify the claim to make the basis for comparison clear, for example, by saying "20% more recycled content than our previous package." Otherwise, the advertiser should be prepared to substantiate whatever comparison is conveyed to reasonable customers.

Specific Environmental Marketing Claims

The Green Guides are perhaps most significant for the specific guidance they offer on structuring environmental marketing claims. The Guides address eight categories of environmental claims: (1) general environmental benefit claims, (2) degradable biodegradable, and photodegradable claims, (3) compostable claims, (4) recyclable claims, (5) recycled content claims, (6) source reduction claims, (7) refillable claims, and (8) ozone safe and ozone friendly claims.[38] Each category describes the elements of the different claims and any qualifications that may be necessary to avoid consumer deception. Each category is also accompanied by examples illustrating claims that do and do not comport with the Guides. The examples are not an exhaustive list of all the different claims that could be made, but provide some "safe harbors" and identify some minefields. Representative examples from each of the eight categories of environmental claims are set forth below.

General environmental benefit. A pump spray product is labeled "environmentally safe." Most of the product's active ingredients consist of volatile organic compounds that may cause smog by contributing to ground-level ozone formation. The claim is deceptive because, absent further qualification, it is likely to convey to consumers that use of the product will not result in air pollution or other harm to the environment.[39]

Degradable/biodegradable/photodegradable. A soap or shampoo product is advertised as "biodegradable," with no qualification or other disclosure. The manufacturer has competent and reliable scientific evidence demonstrating that the product, which is customarily disposed of in sewage systems, will break down and decompose into elements found in nature in a short period of time. The claim is not deceptive.[40]

Compostable. A manufacturer makes an unqualified claim that its package is compostable. Although municipal or institutional composting facilities exist where the product is sold, the package will not break down into usable compost in a home compost pile or device. To avoid deception, the manufacturer should disclose that the package is not suitable for home composting.[41]

Recyclable. A nationally marketed bottle bares the unqualified statement that it is "recyclable." Collection sites for recycling the material in question are not available to a substantial majority of consumers or communities, although collection sites are established in a significant percentage of communities or available to a significant percentage of the population. The unqualified claim is deceptive because, unless evidence shows otherwise, reasonable consumers living in communities not served by programs may conclude that recycling programs for the material are available in their area. To avoid deception, the claim should be qualified to indicate the limited availability of programs, for example, by stating "this bottle may not be recyclable in your area," or "recycling programs for this bottle may not exist in your area." Other examples of adequate qualifications of the claim include providing the approximate percentage of communities or the population to whom programs are available.[42] In contrast, the statement "Please Recycle" on an aluminum beverage can is not deceptive even without qualification. Because collection sites for recycling aluminum beverage cans are available to a substantial majority of consumers or communities, the claim does not need to be qualified to indicate the limited availability of recycling programs.[43]

Recycled content. A manufacturer routinely collects spilled raw material and scraps left over from the original manufacturing process. After a minimal amount of reprocessing, the manufacturer combines the spills and scraps with virgin material for use in further production of the same product. A claim

that the product contains recycled material is deceptive since the spills and scraps to which the claim refers are normally reused by industry within the original manufacturing process, and would not normally have entered the waste stream.[44]

A product in a multi-component package, such as a paperboard box in a shrink-wrapped plastic cover, indicates that it has recycled packaging. The paperboard box is made entirely of recycled material, but the plastic cover is not. The claim is deceptive since, without qualification, it suggests that both components are recycled. A claim limited to the paperboard box would not be deceptive.[45] In contrast, a laser printer toner cartridge, containing 25% recycled raw materials and 40% reconditioned parts is labeled "65% recycled content; 40% from reconditioned parts." This claim is not deceptive.[46]

Source reduction. An ad claims that solid waste created by disposal of the advertiser's packaging is "now 10% less than our previous package." The claim is not deceptive if the advertiser has substantiation that shows that disposal of the current package contributes 10% less waste by weight or volume to the solid waste stream when compared with the immediately preceding version of the packaging.[47]

Refillable. A bottle of fabric softener states that it is in a "handy refillable container." The manufacturer also sells a large-sized container that indicates that the consumer is expected to use it to refill the smaller container. The manufacturer sells the large-sized container in the same market areas where it sells the small container. The claim is not deceptive because there is a means for consumers to refill the smaller container from larger containers of the same product.[48]

Ozone safe and ozone friendly. The seller of an aerosol product makes an unqualified claim that its product "Contains no CFCs." Although the product does not contain CFCs, it does contain HCFC-22, another ozone depleting ingredient. Because the claim "Contains no CFCs" may imply to reasonable consumers that the product does not harm the ozone layer, the claim is deceptive.[49]

Practitioners should consult the regulations for more examples and for descriptions of the elements and qualifications that should accompany each category of claims.[50]

Evaluation

The Green Guides have been in existence for eight years now, and there is reason to believe that they are having a positive impact. In an April 1997 letter to a member of the California Legislature, the Director of the FTC Bureau of Consumer Protection noted that "[t]he comments the Commission received during the 1995-96 review period from industry, environmental groups, and federal and state authorities indicated that the Guides were working well and that industry largely was complying with them."[51] Further positive indications of compliance were evidenced by an informal FTC survey conducted in April 1999 of 150 Internet web sites making environmental advertising claims for their products.[52]

A University of Utah study presents empirical data to support the positive impact of the Green Guides. The study found that "the number of environmental claims on products actually increased substantially between 1992 and 1994, indicating that the Guides did not discourage manufacturers from making environmental claims."[53] Although compliance was initially not widespread, "environmental claims had improved in quality (that is, they had become more specific and more qualified) without any decrease in their frequency."[54] The Director of the FTC Bureau of Consumer Protection drew similar conclusions. He wrote in 1997 that "the most egregious, deceptive claims had disappeared from the marketplace, and the total number of deceptive claims had also been reduced."[55]

Despite these accolades, some commentators have been skeptical about the true efficacy of the Green Guides. A primary criticism is that the Guides are non-binding and thus offer little improvement over case-by-case enforcement actions pursued under Section 5 of the FTC Act.[56] The need for more narrowly drawn "safe harbor" provisions and the absence of a private cause of action under the FTC Act have also been cited as weaknesses.[57] Still others would like to see federal guidelines that preempt state and local regulation.[58]

Congressional action in this area could accommodate some of these criticisms. As discussed above, the regulation of environmental marketing subsumes the dual goals of consumer protection and sound environmental policy. Since the FTC has expressed doubt as to its jurisdiction to effect substantive environmental policy, an approach involving both the FTC and the EPA has been suggested.[59] This was the approach favored by H.R. 3865, first introduced by Representative Al Swift of Washington in 1991.[60] This bill, which was never enacted, would have given regulatory authority to the EPA while allowing for FTC enforcement. Another failed legislative proposal was the Environmental Marketing Claims Act of 1990. It was first introduced as S. 3218 by Senators Lautenberg of New Jersey and Lieberman of Connecticut in 1990 and reintro-

duced as S. 615 in 1991.[61] This measure would have "withdrawn FTC authority to define environmental marketing terms and would have instead authorized EPA…to define and govern the use of the most commonly occurring [environmental] terms."[62] There have been no significant bills since 1991 as the emergence of the Green Guides squelched all attempts to put EPA at the helm of the environmental marketing movement.[63]

Conclusion

The Green Guides have achieved much success over the past eight years. This success, coupled with the lack of significant congressional interest in this subject since issuance of the Guides, suggests that the FTC is likely to maintain the dominant role in the area of federal environmental marketing regulation and that the Green Guides are here to stay.

---

[1] Jamie A. Grodsky, *Certified Green: The Law and Future of Environmental Labeling*, 10 YALE J. ON REG. 147, 147 (1993).

[2] Roscoe B. Starek, III, Commissioner, FTC, *A Brief Review of the FTC's Environmental and Food Advertising Enforcement Programs* (October 13, 1995) <http://www.ftc.gov/speeches/starek/rbsgre.htm>.

[3] Other avenues of discussion include third-party certification methods, U.S. Environmental Protection Agency ("EPA") efforts, and draft standards adopted by the International Standards Organization ("ISO").

[4] Starek, *supra* note 2.

[5] Grodsky, *supra* note 1, at 150.

[6] Roscoe B. Starek, III, Commissioner, FTC, *F.T.C. 'Green Guides': A Consumer Success Story*, WEST'S LEGAL NEWS, December 23, 1996, *available in* 1996 WL 730228.

[7] Grodsky, *supra* note 1, at 164.

[8] *See* VA. CODE ANN. § 3.1-385.1-8 (Michie 1996).

[9] Percival *et al.*, ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 136 (2d ed. 1996). The California statute withstood a First Amendment challenge. *Association of Nat'l Advertisers, Inc. v. Lungren*, 44 F.3d 726 (9th Cir. 1994).

[10] Letter from Joan Z. Bernstein, Director of the FTC Bureau of Consumer Protection, to Michael J. Machado, Assembly member of the California Legislature (April 7, 1997) <http://www.ftc.gov/be/v970003.htm>. *See* CAL. BUS. & PROF. CODE § 17508.5 (West 1995); N.Y. COMP. CODES R. & REGS. tit. 6, § 368.1 (1996); R.I. GEN. LAWS § 6-13.3-4 (1996).

[11] *See* Me. Rev. Stat. Ann. tit. 38, § 2142 (West 1996).

[12] Starek, *supra* note 6.

[13] *See*, *e.g.*, *Standard Oil Co. of California*, 84 F.T.C. 1401 (1974), *aff'd as modified*, 577 F.2d 653 (9th Cir. 1978); *Ex-Cell-O Corp.*, 82 F.T.C. 36 (1973).

[14] Bernstein letter, *supra* note 10.

[15] Federal Trade Commission News Release (July 28, 1992) <http://www.ftc.gov/opa/predawn/F93/greenguid3.txt>.

[16] 56 FED. REG. 24,968 (1991).

[17] Starek, *supra* note 2.

[18] 57 FED. REG. 36,363 (1992).

[19] FTC News Release, *supra* note 15.

[20] Bernstein letter, *supra* note 10.

[21] 61 FED. REG. 53,311 (1996).

[22] 63 FED. REG. 24,240 (1998).

[23] *See* Consumer Protection hyperlink at <http://www.ftc.gov>.

[24] 15 U.S.C. § 45 (1994).

[25] 16 C.F.R. pt. 260, n.1 (1999) (citing *Cliffdale Associates, Inc.*, 103 F.T.C. 110, 176, 176 n.7, n.8, Appendix, *reprinting* letter dated Oct. 14, 1983, from the Commission to the Honorable John D. Dingell, Chairman, Committee on Energy and Commerce, U.S. House of Representatives (1984)).

[26] Starek, *supra* note 5.

[27] 16 C.F.R. § 260.5 (1999).

[28] 16 C.F.R. § 260.1 (1999).

[29] 16 C.F.R. § 260.2 (1999).

[30] 16 C.F.R. § 260.2 (1999).

[31] 16 C.F.R. § 260.6(a) (1999).

[32] Starek, *supra* note 2.

[33] 16 C.F.R. § 260.6(b) (1999).

[34] *Id*.

[35] 16 C.F.R. § 260.6(c) (1999).

[36] *Id*.

[37] 16 C.F.R. § 260.6(d) (1999).

[38] 16 C.F.R. § 260.7 (1999).

[39] 16 C.F.R. § 260.7(a) (1999).

[40] 16 C.F.R. § 260.7(b) (1999).

[41] 16 C.F.R. § 260.7(c) (1999).

[42] 16 C.F.R. § 260.7(d) (1999).

[43] *Id*.

[44] 16 C.F.R. § 260.7(e) (1999).

[45] *Id*.

[46] *Id*.

[47] 16 C.F.R. § 260.7(f) (1999).

[48] 16 C.F.R. § 260.7(g) (1999).

[49] 16 C.F.R. § 260.7(h) (1999).

[50] See 16 C.F.R. § 260.7 (1999).

[51] Bernstein letter, *supra* note 10.

[52] *FTC Releases Revised Consumer Brochure about "Green" Claims*, M2 PRESSWIRE, April 23, 1999, *available in* 1999 WL 15761440.

[53] Bernstein letter, *supra* note 10, at n.3 (citing R.N. Mayer, B. Cude, J. Gray-Lee & D.L. Scammon, *Trends in Environmental Marketing Claims Since the FTC Guides: Technical Report* (May 1, 1995)).

[54] *Id*.

[55] Bernstein letter, *supra* note 10.

[56] *See*, *e.g.*, Grodsky, *supra* note 1, at 159.

[57] *Id*. at 158-60.

[58] Kimberly C. Cavanagh, Comment: *It's a Lorax Kind of Market! But Is It a Sneetches Kind of Solution?: A Critical Review of Current Laissez-Faire Environmental Marketing Regulation*, 9 VILL. ENVTL. L.J. 133, 183 (1998).

[59] *Id*. at 172-73.

[60] *See* H.R. 3865, 102d Cong. (1991).

[61] Grodsky, *supra* note 1, at 165 (citations omitted); S. 3218, 101st Cong. (1990); S. 615, 102d Cong. (1991).

[62] *Id*.

[63] Cavanagh, *supra* note 58, at 142.

Case Digest

United States Supreme Court

Takings — *Dolan* Not Applicable to Denial of Permits for Development

City of Monterey v. Del Monte Dunes at Monterey, Ltd., 119 S. Ct. 1624 (May 24, 1999)

Del Monte Dunes brought this action against the City of Monterey in the United States District Court for the Northern District of California under 42 U.S.C. § 1983, alleging, *inter alia*, that denial of its final development proposal was a violation of the Due Process and Equal Protection clauses of the Fourteenth Amendment and an unconstitutional, regulatory taking.

Del Monte Dunes had submitted proposals to the City on five different occasions requesting the right to develop a parcel of land. The City denied these proposals, each time imposing more rigorous demands on the developer. Del Monte Dunes alleged that the city effected a regulatory taking or otherwise injured the property by unlawful acts without paying compensation or providing an adequate post-deprivation remedy for the loss. The jury found in favor of Del Monte Dunes on the takings equal protection claims. Del Monte Dunes was awarded $1.45 million in damages.

When the case reached the Supreme Court, the questions presented were (i) whether issues of liability were properly submitted to the jury on the takings claim, (ii) whether the jury may reweigh the reasonableness of the City's landuse decision, and (iii) whether the rough-proportionality standard of *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309 (1994), applied.

The Supreme Court addressed these questions in reverse order. First, the Supreme Court held that *Dolan* was not designed to address and is not readily applicable to situations where the landowner's takings claim is based not on excessive exactions but on denial of development.

Second, the Supreme Court addressed the standard of review of the city's denial and held that the jury instructions were consistent with the Court's prior holdings. In particular, the jury was presented with the question of whether, "in light of all the history and the context of the case, the City's particular decision to deny Del Monte Dunes' final development proposal was reasonably related to the City's proffered justifications."

The final issue before the Supreme Court was whether it was proper for the District Court to submit the question of liability on the takings claim to the jury. The answer hinged on whether Del Monte Dunes had a statutory or constitutional right to a jury, and if it did, the nature and extent of the right. Del Monte asserted a right to a jury trial under 28 U.S.C. § 1983 and the Seventh Amendment. The Supreme Court disagreed with Del Monte Dunes' assertion that the phrase "action at law" is a term of art implying a right to a jury trial and, therefore, found that Section 1983 does not confer the right to a jury.

In analyzing the Seventh Amendment right to a jury trial, the Supreme Court found that a Section 1983 suit seeking legal relief is an action at law within the meaning of the Seventh Amendment. Because the Court found that the suit was an action at law, the Court next considered whether the particular issues of liability were proper for determination by the jury. The Court held that it was proper to submit the liability issues to the jury because they were essentially "fact-bound" in nature.

United States Court of Appeals

OPA — Recoverable Costs Limited to Costs Associated with Carrying Out Federal Coordinator's Directives

Gatlin Oil Company, Inc. v. United States, 169 F.3d 207 (4th Cir. March 2, 1999)

The United States appealed the Fourth Circuit's ruling that an oil company was entitled to full com-

pensation under the Oil Pollution Act, 33 U.S.C. § 2701 *et seq*. ("OPA"), for removal costs that the federal coordinator determined were consistent with the National Contingency Plan, costs resulting from actions he had directed, and the loss of earnings capacity caused by carrying out his directives.

In 1994, a vandal jammed open aboveground fuel storage tanks on Gatlin Oil Company's ("Gatlin's") property that caused an oil spill of 20,000-30,000 gallons. The spill caused a fire that destroyed a warehouse, bulk plant, inventory, a loading dock, and several vehicles. Upon arriving at the scene, the federal coordinator estimated that there were 5,500 gallons of oil in surrounding ditches and that 10 gallons of oil had seeped into a creek. The federal coordinator outlined clean up directives for Gatlin. State authorities imposed additional requirements. Gatlin complied with the federal and state requirements and attempted to recover its costs from the Oil Spill Liability Trust Fund ("Fund") created by OPA.

OPA was enacted in the wake of the Exxon Valdez spill to provide a prompt, federally-coordinated re-sponse to oil spills in navigable waters of the United States and to compensate innocent victims. The owner of an onshore facility is generally responsible for clean up costs asociated with a spill from its facility. However, proof that a third party caused the spill is a complete defense and entitles an owner to reimbursement of clean up costs consistent with the National Contingency Plan.

Because the spill was caused by a third party, Gatlin sought recovery of all damages resulting from the oil spill and the ensuing fire, a sum amounting to $850,000 plus interest. The Coast Guard limited Gatlin's recovery to damages caused by the 10-gallons discharge into navigable waters, the 5,500 gallons in the ditches, and oil in gravel around the two tanks that threatened to discharge into navigable waters. Gatlin sought judicial review in federal district court, which set aside the agency decision and remanded the case for further fact finding on compensation. The United States appealed.

The Fourth Circuit reviewed the Coast Guard's interpretation of OPA under the two-step test of *Chevron U.S.A., Inc. v. National Resources Defense Council*, 467 U.S. 837, 104 S. Ct. 2778 (1984). The court held that the agency's interpretation was reasonable and that Gatlin's recovery was limited to damages "that resulted from a discharge of oil or from a substantial threat of a discharge of oil into navigable waters or the adjacent shoreline." The court held that Gatlin was entitled to full compensation for loss of earnings and earnings capacity due to carrying out the federal coordinator's directions. However, Gatlin could not recover for fire damage because the fire did not cause the discharge of oil into navigable waters nor pose a substantial threat of a discharge. The court also held that Gatlin was not entitled to recover the costs of complying with the directives of state officials. Gatlin's claim for interest was held barred by the no-interest rule, which prohibits an award of interest against the United States in the absence of an express waiver of sovereign immunity. The court remanded the case for a determination of whether the Coast Guard's measure of recoverable damages was reasonable.

Environmental Justice and NEPA — No Discrimination Found in Siting of Treatment Facility

Goshen Road Environmental Action Team v. United States Department of Agriculture, 176 F.3d 475 (4th Cir. Apr. 6, 1999)

Goshen Road Environmental Action Team ("GREAT") and two neighborhood residents brought this action in the United States District Court for the Eastern District of North Carolina against the United States Department of Agriculture ("USDA") and the Town of Pollocksville, North Carolina, in connection with the Town's siting of a wastewater treatment plant ("WWTP"). Plaintiffs alleged violations of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq*., and the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq*. They sought preliminary and permanent injunctions against operation of the WWTP. The district court denied the request for a preliminary injunction and the Fourth Circuit affirmed. *Goshen Road Environmental Action Team v. USDA*, 103 F.3d 117 (4th Cir. 1996) (unpublished table decision). The district court then granted summary judgment for the defendants, which was affirmed by the Fourth Circuit.

In 1985, the Town contracted with the engineering firm of Rivers and Associates, Inc. ("Rivers") to examine options for the construction of the WWTP. The firm recommended a WWTP that would discharge treated effluent into the Trent River. The Town then applied for and received funding for the facility from the USDA through the Farmers Home Administration ("FmHA") of the USDA. In April 1986, the FmHA conducted an Environmental Assessment ("EA") of the proposed project as required by NEPA. The agency concluded that the project would not have a significant effect on the environment. Therefore, FmHA issued a Finding of No Significant Impact ("FONSI"), which eliminated the need for a more detailed Environmental Impact Statement ("EIS").

Prior to the construction of the plant, North Carolina reclassified the Trent River as a nutrient sensitive waterway. The reclassification would have required additional treatment at the WWTP. Consequently Rivers changed its recommendation to land treatment, treated effluent is sprayed onto fields near the facility rather than discharged to a waterbody.

The Town began searching for possible sites. The Town rejected sites to the north and east because they would have required pumping the effluent across the Trent River and Mill Creek. Land to the south was rejected due to poor soil conditions. The Town selected four sites to the west for further study. Sites 1 and 3 were owned by white persons and sites 2 and 4 were owned by African-Americans. Rivers contracted with Law Engineering to perform a soil analysis for each site. Law Engineering concluded that Sites 2 and 4 were preferable because they had good soil, presented the least potential for public contact, and provided natural buffers to adjoining land. Rivers ultimately recommended Site 4 because it had more absorbent soil, required slightly less land than Site 2, had existing road frontage for access, and was farther from the Trent River in the event of a spill.

The Town selected Site 4 and informed the FmHA of its decision. In February 1991, the FmHA amended its original EA to reflect the change to land treatment. Again, FmHA concluded that the project would have no significant environmental impact and, therefore, did not prepare a detailed EIS. The Town condemned Site 4, constructed the WWTP, and began operations.

Title VI of the Civil Rights Act prohibits discrimination on the basis of race by any entity receiving federal funding. 42 U.S.C. § 2000d. USDA's regulations under Title VI prohibit funding recipients from siting facilities in a manner that creates a disparate racial impact. 7 C.F.R. § 1901.202(2)(viii)(A). GREAT claimed that the Town and the USDA violated Title VI by locating the WWTP in a majority African-American community. For the same reasons cited by the district court, the Fourth Circuit rejected the Title VI claim because the Town provided "substantial legitimate nondiscriminatory reasons" for its siting decision.

The court discussed the Town's reasons for selecting land treatment over a more typical discharge facility as well as its decision to site the plant to the west of town. Of the four western sites, the court stated that the Town had based its selection of Site 4 on the "legitimate, race-neutral recommendation" of its engineers. The court also found that GREAT did not introduce any scientific evidence to support its claim that other equally effective sites existed in the area. GREAT also claimed that the Town's reasons for selecting Site 4 were a pretext for discrimination. GREAT argued that the rejection of sites to the north and east to avoid pumping treated effluent across the Trent River and Mill Creek was pretextual because Site 4 required pumping across Goshen Creek and a swamp. The court rejected this argument because GREAT produced no evidence that crossing Goshen Creek or the swamp presented the same environmental risks as crossing the reclassified Trent River.

Finally, GREAT argued under NEPA that the FmHA's amended EA was insufficient and, therefore, the decision not to prepare a detailed EIS was arbitrary and capricious. GREAT alleged that the amended EA was insufficiently site-specific, failed to consider the Goshen area's historical significance, failed to consider alternatives adequately, and failed to consider the racially disproportionate burden resulting from selection of Site 4. The court held that the original EA sufficiently covered the Goshen area and, therefore, greater specificity in the amended EA was unnecessary. The original EA specifically referred to a state historic preservation officers finding of no historical significance. It also rejected as infeasible alternative methods of treatment. The court held that there was no need to repeat these findings in the amended EA. As for the claim that the amended EA failed to consider any racially disproportionate burden, the court held that neither

NEPA nor the implementing regulations require an EA to include a disparate impact analysis.

Negligent Performance of an Environmental Assessment

Jonas B. Crooke Interests, Inc. v. CTL Eng'g, Inc., Nos. 97-1227, 97-1357, 175 F.3d 1014 (4th Cir. Mar. 29, 1999)

Jonas B. Crooke Interests, Inc. ("JCI") brought this action against CTL Engineering, Inc. ("CTL") in the United States District Court for the Eastern District of Virginia alleging various causes of action arising out of CTL's performance of an environmental site assessment ("ESA"). After JCI obtained a jury verdict in the amount of $300,027, both parties appealed the district court's rulings on various motions. As discussed below, the Fourth Circuit affirmed in part and reversed in part.

In July 1995, JCI purchased an option to buy a tract of land. During the feasibility period under the option agreement, JCI retained CTL to conduct an ESA. CTL reported that there was no evidence of any recognized environmental condition on the property. With the option about to expire, JCI negotiated a proposed agreement for development of the property with Northwestern Mutual Life Insurance Company ("Northwestern"). JCI was to assign its purchase rights and the fruits of its predevelopment activity to Northwestern for an assignment fee of $189,443. Then, Northwestern was to retain JCI to develop the property for a development fee of $530,000. Before the deal closed, however, Northwestern conducted its own ESA and discovered adverse environmental conditions that CTL had failed to identify. Northwestern wanted more time to study the property, but JCI's option expired and the property was sold to another buyer.

JCI sued CTL alleging breach of contract, professional negligence, and constructive fraud. JCI sought damages for the money and resources expended on the project and for the loss of benefits it would have gained as a result of the agreement with Northwestern. The district court granted CTL's motion for partial summary judgment on JCI's claims for the $530,000 development fee but denied the motion with respect to JCI's claims for predevelopment expenses and for loss of opportunity to recover those expenses. The district court also granted CTL's motion for summary judgment on the constructive fraud claim. After a jury returned a verdict for JCI in the amount of $300,027, CTL unsuccessfully moved for judgment as a matter of law or alternatively for a new trial on damages.

On appeal, CTL argued that the district court erred in denying its motion for judgment as a matter of law on the professional negligence claim because JCI's alleged injury was for a solely economic loss. The Fourth Circuit rejected this argument because under Virginia law economic losses may be recovered under a negligence theory if there is privity of contract between the parties. CTL and JCI had a contractual relationship. Therefore, the court held that JCI was entitled to recover damages for economic loss under a negligence theory. Assuming damages for economic loss are recoverable in a negligence action, CTL further argued that JCI did not offer sufficient evidence to prove that CTL's failure to detect the adverse environmental conditions caused JCI to suffer any injury. JCI argued that it was damaged in two ways. First, it incurred expenses on the project that would not have been incurred if the ESA had been performed correctly. Second, the delay resulting from the subsequent discovery of the adverse environmental conditions caused JCI to lose reimbursement of those expenses under the agreement with Northwestern.

The Fourth Circuit found that JCI had offered no evidence that it would have abandoned the project if CTL had conducted the ESA properly. However, it also found that JCI had offered evidence supporting the inference that but for CTL's negligence, JCI would have cleaned up the property, consummated the agreement with Northwestern, and obtained the $189,443 assignment fee upon closing the deal. Therefore, Fourth Circuit held that the district court properly denied CTL's motion for judgment as a matter of law on the negligence claim.

CTL also argued that the district court abused its discretion in denying CTL's motion for a new trial on damages. CTL asserted that the only injury that the jury reasonably could have found to have been proximately caused by CTL's negligence was loss of the $189,443 assignment fee. However, the jury awarded $300,027. The Fourth Circuit agreed because the deal with Northwestern would have reimbursed JCI

less than $200,000 in predevelopment expenses. Thus, the court reversed and remanded for a new trial on damages as to the professional negligence claim.

Finally, JCI argued that the district court erred in granting partial summary judgment to CTL with respect to the $530,000 development fee. JCI contended that the evidence presented a genuine issue of material fact regarding whether it would have collected the development fee but for CTL's failure to identify the adverse environmental conditions. The court disagreed, finding that absent evidence tending to prove that JCI and Northwestern actually would have completed the development or some portion of it, JCI failed to raise a factual issue as to whether it would have earned the development fee. Thus, the court held that the district court properly granted partial summary judgment to CTL on JCI's claim for damages in the amount of the development fee.

CWA — No Reversible Error Where Counsel Invites Erroneous Instruction

United States v. Ellis, 1999 U.S. App. Lexis 2690 (4th Cir. Feb. 22, 1999) (unpublished decision)

Defendants Kerry Ellis and Seawitch Salvage (collectively, Ellis) were convicted in United States District Court for the District of Maryland of violating the Clean Air Act and Clean Water Act. Ellis was found guilty of improperly removing and disposing of asbestos during the breaking of Navy surplus vessels, failing to notify the appropriate environmental agency that asbestos removal was occurring at the site, and dumping debris and petroleum products into Baltimore Harbor without a permit. On appeal, Ellis argued that the indictment was constructively amended when the judge instructed the jury on too broad a definition of friable asbestos. Ellis also argued that defense counsel was ineffective, that prosecutorial misconduct occurred during closing argument, that the jury instructions concerning violations of the Clean Water Act erroneously omitted the knowledge requirement, and that the government produced insufficient evidence to support the false statement conviction. The Fourth Circuit found no reversible error and affirmed the defendant's conviction.

Ellis, the owner and president of Seawitch Salvage, a ship-breaking business located on Baltimore Harbor, purchased decommissioned Navy vessels and demolished them into scrap metal. Ellis successfully bid on and purchased four decommissioned Navy ships, the USS Inflict, the USS Fearless, the USS Illusive, and the USS Coral Sea. The government contract between Ellis and the Defense Reutilization and Marketing Service ("DRMS") clearly indicated that several compartments on each of the four ships contained asbestos. The contract mandated that purchasers of the ships were to dispose of all asbestos in accordance with applicable regulations. Ellis certified that asbestos abatement would be done on the Inflict and Fearless.

In May of 1993, Ellis did not, however, file the required NESHAP notice and thus no asbestos abatement occurred prior to the breaking of the Illusive. In August 1994, EPA agents visited Ellis to investigate whether Ellis had followed proper asbestos abatement procedures. Upon inspection, the EPA agents found several environmental compliance violations. As a result of the investigation of Ellis' ship breaking practices, Ellis was charged with a seven-count indictment. A jury returned a verdict of guilty on all counts. The district court sentenced Mr. Ellis to 30 months' imprisonment, three years' supervised release, and assessed a $50,000 fine. In addition, the court sentenced Seawitch Salvage to five years' probation and ordered the company to pay a $50,000.00 fine.

On appeal to the Fourth Circuit, defendants challenged their convictions on five grounds, all of which were rejected by the Court. First, Ellis asserted that, pursuant to the defense counsel's request, the judge gave an incorrect definition of "regulated asbestos containing material." The court rejected this assertion and found that defense counsel invited such an error in the instructions. Ellis subsequently argued that defense counsel's invitation of this error constituted ineffective assistance of counsel. The court rejected this argument and held that such a claim of ineffective assistance of counsel must be raised in a 28 U.S.C. § 2255 motion in the district court rather than on direct appeal.

Ellis further argued that the government committed reversible prosecutorial misconduct during its closing argument by making

twelve incorrect and misleading statements of fact or law relating to the friability of asbestos aboard the Illusive and the Coral Sea. The court held that the trial court issued a curative instruction that prevented any prejudicial statements by the prosecution from misleading the jury. Ellis further argued that the district court gave erroneous jury instructions regarding violations of the Clean Water Act. The court held that because Ellis did not object to the instructions during the trial it must review for plain error. Ultimately, the court held that although the instructions were technically erroneous the error was not such that would harm the fairness, integrity or public reputation of the judicial proceedings. Finally, Ellis argued that the evidence presented at trial was insufficient to support a conviction. The court ruled that Ellis' assertion was without merit and that the evidence against Ellis was substantial.

Federal District Court

CWA and ESA — Discovery in Citizen Suits Limited to Administrative Record

American Canoe Ass'n, Inc. v. Environmental Protection Agency, 46 F. Supp. 2d 473, No. 98-979-A, 1999 WL 258426 (E.D. Va. Apr. 29, 1999).

The American Canoe Society and the American Littoral Society brought suit in the United States District Court for the Eastern District of Virginia alleging that the United States Environmental Protection Agency ("EPA") had failed to perform certain non-discretionary duties imposed by the Clean Water Act ("CWA") and the Endangered Species Act ("ESA"). EPA moved for a protective order limiting discovery to the administrative record and striking plaintiffs' amended discovery requests. The district court granted EPA's motion.

Count 4 of the complaint alleged that EPA had failed to establish total maximum daily loads ("TMDLs") for Virginia's waters in accordance with Section 303(d) of the CWA. Count 6 alleged that EPA's failure to either approve or disapprove Virginia's continuing planning process ("CPP") constituted a failure to perform a non-discretionary duty under Section 303(e) of the CWA. Finally, Count 11 alleged that EPA had violated the ESA by failing to consult with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service pursuant to Section 7 of the ESA before taking various actions related to its approval of Virginia's CWA efforts. These claims were brought under the citizen suit provisions of the respective statutes.

Plaintiffs sought discovery beyond the administrative records produced by EPA. EPA moved for a protective order on the ground that judicial review of agency action is generally confined to the administrative record. Plaintiffs contended this limitation only applies to review of agency ***action*** under the Administrative Procedure Act ("APA"), not to claims under the CWA and ESA citizen suit provisions for EPA's failure to perform a non-discretionary duty.

The Fourth Circuit noted that while it had not yet addressed this question, the Eighth Circuit recently had. In *Newton County Wildlife Ass'n v. Rogers*, 141 F.3d 803, 808 (8th Cir. 1998), the court concluded that review of ESA and CWA citizen suit claims should be confined to the administrative record. Also, in *United States v. Carlo Bianchi & Co.*, 373 U.S. 709, 715 (1963), the Supreme Court stated that "where Congress has simply provided for review, without setting forth the standards to be used or the procedures to be followed,…consideration is to be confined to the administrative record and…no de novo proceeding may be held."

The court found that its own decision in *National Wildlife Federation v. Hanson*, 859 F.2d 313 (4th Cir. 1988), supported the conclusion that the CWA and ESA citizen suit provisions operate in conjunction with the APA's standards and procedures for administrative review. Therefore, "it would be irrational to expand discovery beyond the administrative record, as the APA's 'arbitrary and capricious' standard assumes that the court will, in the usual circumstance, base its review upon the material actually before the agency." Therefore, the court held that discovery in CWA and ESA citizen suits is properly limited to APA record review. The court also noted that circumstances such as failure of the record to explain administrative action or agency reliance on information not con-

tained in the administrative record may, in some cases, justify expanding the record or permitting discovery, but the plaintiffs had failed to demonstrate any such circumstances in this case.

NEPA — Agency's Environmental Impact Statement Held Adequate

Citizens Concerned About Jet Noise v. Dalton, No. 2:98CV800, 1999 WL 322635, 48 F. Supp. 2d 582, (E.D.Va. May 19, 1999)

The defendant United States Navy obtained summary judgment in United States District Court for the Eastern District of Virginia on a claim by plaintiff Citizens Concerned About Jet Noise, Inc. (CCAJN). CCAJN was seeking to halt the transfer of aircraft to Naval Air Station Oceana in Virginia Beach. The plaintiff challenged the transfer by objecting to the adequacy of the Final Environmental Impact Study ("FEIS") produced by the Navy pursuant to the National Environmental Policy Act ("NEPA"), 42 U.S.C.A. §§ 4321-70d. The court held that CCAJN had failed to prove that the FEIS was inadequate or that the decision-maker did not have the information necessary to make an informed decision.

Under a 1993 Base Realignment and Closure ("BRAC") Commission report approved by the President and Congress, the Secretary of Defense was directed to close the Master Jet Base at NAS Cecil Field outside of Jacksonville, Florida, and distribute its air assets to other bases. The Navy evaluated 20 eastern seaboard CCAJN air stations and decided to place all of the aircraft at Oceana. CCAJN filed a suit in July 1998 requesting permanent injunctive relief. In November 1998, CCAJN moved for a preliminary injunction and for summary judgment. The Navy responded by filing a cross-motion for summary judgment.

The Court reviewed the FEIS to determine whether the Navy's decision was arbitrary and capricious, an abuse of discretion, or not in accordance with the law. CCAJN argued that the report's alternatives analysis was inadequate because it did not consider other reasonable alternatives. The court concluded that the Navy sufficiently analyzed the alternatives and was properly informed to make a reasonable decision. CCAJN also argued that the noise analysis was in adequate because it did not fully assess the costs to the community of the higher noise levels associated with the transferred aircraft. The court held that the plaintiff failed to demonstrate that the Navy's decision to rely on average noise levels rather than single-event noise impacts was arbitrary and capricious. Plaintiff also argued that any cost benefit analysis based on the information contained in the FEIS was erroneous because the FEIS failed to disclose significant costs to the community. The court found that the Navy was not arbitrary and capricious in failing to discuss the impact on property values in more detail. Finally, the court rejected CCAJN's arguments concerning safety risks and air quality. The court concluded by describing the citizens brief as "chronic faultfinding" and holding that the Navy's decision was not arbitrary and capricious.

Virginia Supreme Court

Zoning — Cash Proffers Can Be Key Factor in Decision But Not Sole Factor

Gregory v. Board of Supervisors of Chesterfield County, 257 Va. 530, 514 S.E.2d 350 (Apr. 16, 1999)

This case arose out of a denial by the Board of Supervisors of Chesterfield County (Board) for rezoning of a 30-acre parcel of land. The proposed buyer of the property wished to change the zoning from "Agricultural A" to "Single-Family Residential R-12." The Supreme Court of Virginia affirmed the trial court's finding that there was ample evidence showing that the Board's denial of the request for rezoning was based on the proposed development's impact on health, safety, and welfare, and not just the lack or inadequacy of cash proffers by the developer.

By statute, a local governing body may consider voluntarily proffered conditions in deciding whether to grant a rezoning application. The governing body must, however, make its decision based on the merits of the entire appli-

cation and may not require that any proffered conditions be included. *See Va. Code* §§ 15.2-2298, 15.1-2298(A), 15.2-2296; *Board of Supervisors v. Reed's Landing Corp*., 250 Va. 397, 400, 463 S.E.2d 668, 670 (1995) (a local governing body is "not empowered to require a specific proffer as a condition precedent to a rezoning"). Here, the court found that a cash proffer was a "key factor" and even "expected." However, the court determined that the Board's decision was supported by valid health, safety, and welfare concerns and was not based solely on the lack or inadequacy of proffered monies. Therefore, the court upheld the denial of the rezoning request.

Virginia Court of Appeals

VAPA Provides Right to Judicial Review of DEQ's Denial for Reimbursement from Petroleum Storage Tank Fund

May Department Stores Co. v. Commonwealth of Virginia, Dept. of Environmental Quality and Dennis H. Treacy, Director, 29 Va. App. 589, 513 S.E.2d 880 (Apr. 27, 1999)

The May Department Store Company sought reimbursement for certain clean up efforts from the Petroleum Storage Tank Fund (Tank Fund) administered by the Department of Environmental Quality (DEQ). DEQ denied reimbursement and the company appealed to Circuit Court pursuant to the Virginia Administrative Process Act (VAPA), *Va. Code* §§ 9-6.14:1 through 9-6.14:25. The Circuit Court ruled that the company had no right of appeal. The sole issue on appeal to the Court of Appeals was whether the VAPA provides a right of appeal to circuit court of DEQ's denial of reimbursement from the Tank Fund. The Court of Appeals held that the VAPA provides a right of appeal and remanded the case to circuit court for further proceedings.

The State Water Control Law provides expressly that appeals from certain regulations and decisions of the State Water Control Board (Board) shall be governed by the VAPA, but it does not indicate whether, or under what conditions, appeals may be taken from other actions of the Board, such as decisions made regarding the Tank Fund. DEQ, which administers the State Water Control Law, contended that only the decisions listed in the State Water Control Law's specific appeals provision may be appealed under the VAPA. The company seeking reimbursement argued that the VAPA provides for review of agency action even where the agency's basic law does not expressly do so, as long as review is not specifically excluded. The Court of Appeals agreed.

The VAPA was designed as a default or catchall provision, applicable whenever the basic law fails to provide process. Thus, whenever an agency's basic law provides expressly for VAPA coverage of certain proceedings under specified conditions and makes no provision for judicial review of other proceedings, the unmentioned proceedings are subject to the VAPA unless otherwise expressly excluded. The fact that *Va. Code* § 62.1-44.29 specifically mentions judicial review of only a limited number of Board decisions does not compel the conclusion that the General Assembly intended only those decisions to be reviewable. The Court of Appeals found that the provisions of the *Code* that specifically mention judicial review lay out a more stringent test than under the VAPA for determining who has standing to seek review.

DEQ also argued that the remedy sought by the company (*i.e.* reimbursement) rendered the VAPA inapplicable under the exclusion for agency action relating to "[m]oney or damage claims against the Commonwealth or agencies thereof" and "[g]rants of state or federal funds or property." *Va. Code* §§ 9-6.14:4.1(B)(1), (4). The Court of Appeals rejected this contention because reimbursements from the Tank Fund are neither "money or damage claims" nor "grants" within the meaning of the VAPA. The Court of Appeals found that the VAPA provides a right to judicial review of the DEQ's denial of reimbursement from the Tank Fund and remanded the case to the circuit court for further proceedings.

Environmental Law News
Virginia State Bar
Eighth & Main Building
707 E. Main Street, Ste. 1500
Richmond, VA 23219-2800

PRST STD
U.S. POSTAGE
PAID
PERMIT NO. 709
RICHMOND